Supreme Court, U.S.
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NO: ____

In The
Supreme Court of the United States

HOWARD C MCDONALD JR
Petitioner

V

ROSEMARY S MCDONALD
Respondent

On Petition For Writ Of Certiorari
To The Mississippi Supreme Court

PETITION FOR WRIT OF CERTIOARI

Howard C McDonald Jr
411 North Joann Street
Tupelo, Mississippi 38801
662-844-5869

QUESTIONS PRESENTED

***Preface*: This case revolves around the post final divorce decree acts of a non-constitutional "Special Judge" resulting in the taking of fundamental interests and money without motion or hearing of which no post deprivation relief lies.**

1. **May a state judge, de facto or de jure, deprive a constitutionally protected interest, without motion before the court or due process hearing, where no post deprivation relief lies, without being constitutionally offensive, thus void ?**

2. **Does the failure of a custodial parent to release their child to a stranger known only as an alcoholic, drug addict and homosexual partner of the non custodial parent, without notice from the non custodial parent, rise to the level of contemptuous conduct ?**

3. **Does a state appellate court that does not answer the questions raised on appeal, changes legislative law without constitutional challenge and cites no authority for its conflicting decision, provide a meaningful appeal ?**

PARTIES TO PROCEEDING

The Petitioner and Respondent to this proceeding are named in the caption. Other interested parties are:

1. **The Mississippi Supreme Court Justices**

2. **The Mississippi Corporation known as the Mississippi Bar Association**

3. **The American Civil Liberties Union, its agents and assigns.**

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv-vii
OPINONS BELOW	vii
JURISDICTION	viii
CONSTITUTIONAL and STATUTORY PROVISIONS	viii-xvi
STATEMENT OF THE CASE	1-5
ARGUMENT	5-17
REASONS FOR GRANTING WRIT	17-22

APPENDIX

Mississippi Supreme Court - Affirming	Appendix 1-6
- Dissenting	Appendix 6-11
Mississippi Court of Appeals	Appendix 12-31
Trial Court Order 14 Jul 99	Appendix 32-40
Trail Court Bench Ruling 3 Aug 99	Appendix 41-44
District Court Opinion	Appendix 45-48
District Court Denial Rehear	Appendix 49
Court of Appeals Opinion	Appendix 50-53
Court of Appeals Denial Rehear	Appendix 54-55

TABLE OF CITED AUTHORITIES

	Page
Constitutions	
U. S. Constitution Bill of Rights Art XIV	15, 17, 19, 20
Mississippi Constitution Art 1 Sect 1	16
Mississippi Constitution Art 3 Sect 14	15, 17, 19, 20
Mississippi Constitution Art 3 Sect 24	17, 20
Mississippi Constitution Art 4 Sect 1	17
Mississippi Constitution Sect 155	9
Mississippi Constitution Sect 165	8, 9
Statutes	
Mississippi Code Annotated 9-1-105	8, 9
Mississippi Code Annotated 11-53-79	11, 16
Mississippi Code Annotated 25-7-9	11, 16
Mississippi Code Annotated 25-7-13	11, 16
Mississippi Code Annotated 9-1-17	15
Mississippi Rules of Civil Procedure	
MRCP 6	10
MRCP 60	9, 10

MRCP 81 6, 7

Federal Case Law

Ball v US 140 US 118 8

Codispoti v Pennsylvania 418 US 506 14

Elrod v Burns 427 US 347 (1976) 19

Evitts v Lucey 469 US 387 (1985) 17

Hudson v Palmer 468 US 531 5

Hagen v Levine 415 US 528 8

Hellenic American Neighborhood Action Committee V City of New York citing Hudson v Palmer 468 US 531 5

Logan v Zimmerman Brush Co 455 US 422 5

Myer v Nebraska 262 US 390, 399,401 (1923) 18

Norton v Shelby County 118 US 425 8

Reno v Flores 507 US 292, 301, 302 (1993) 18

Ryder v US No 94-431 8

Troxel v Granville No 99-138 12, 15, 18, 20

Washington v Glucksburg 521 US 702, 719 (1977) 15, 19

Mississippi Case Law

Banks v Banks 511 So 2d 933 (Miss 1987) 10
Barnes v Barnes 317 So 2d 387 (Miss 1975) 10
Barton v Barton 95-CT-01020-SCT 14
Bredemier v Jackson 689 So 2d 770 (Miss 1992) 6, 7
Bryant Inc v Walters 493 So 2d 933 (Miss 1986) 7, 11, 15
Creel 831 So 2d 1183 6, 15
Cortesi v Cortesi 566 So 2d 702 (Miss 1990) 9
Democratic Exec Com v Hatcher 168 So 2d 533 (1964) 10
Diamond v Diamond 403 So 2d 129 (Miss 1981) 9
Dickerson v Dickerson 148 So 2d 510 (1963) 8
Elliott v Elliott No 2002-CA-00846-COA 6, 15
Fortenberry v Fortenberry 338 So 2d 806 (Miss 1976) 9
Fortune v Lee County 725 So 2d 747 (Miss 1998) 9
Givens v Nicholson No 2002-CA-01582-COA (Miss) 21
Howard v Jayne 86 So 752 (Miss 1926) 10
Lackey v Fuller 755 So 2d 1083 (Miss 2000) 7
Lahman v Hallman 722 So 2d 614 (Miss 1998) 14
Legg v Legg 168 So 2d 58 (Miss 1964) 9
Love v Miss Cotton Seed 137 So 739 (Miss 1931) 10
McKee v McKee 7 So 2d (Miss 1942) 15
Miller v Miller 512 So 2d 1286 (Miss 1987) 9
McKinney v McKinney 374 So 2d 230, 234 (Miss 1979) 15
Morrow v Morrow 591 So 2d 829 (Miss 1991) 6
Newell v State 308 So 2d 71 (Miss 1975) 6
Oneil v Oneil 551 So 2d 228 (Miss 1989) 9
Ortega v Lovel 97-CA-241-SCT 6, 7
Overby v Murray 569 So 2d 303 (Miss 1990) 7, 11
Phillips 555 So 2d 701 (Miss) 7
Purvis v Purvis 657 So 2d 794 (Miss 1994) 14
Roberts v Roberts 866 So 2d 474 (Miss App 2003) 15
Rohrbacher v City of Jackson 51 Miss 735 17
Seaney v Seaney 218 So 2d 5 (Miss 1969) 9
Smith v Jones 654 So 2d 480, 486 (Miss 1995) 6, 7

Spain v Holland 483 So 2d 318 (Miss 1986) 6, 15
Sturgis v Sturgis 792 So 2d 1020 (Miss Ct App 2001) 8
Terry v State 718 So 2d 1097 (Miss 1998) 14
Thompson v Thompson No 2000-CA-00087-CA (Miss) 8
Tucker v Tucker 453 So 2d 1294, 1297 (Miss 1984) 7
Walls v Spell No 97-CA-00378-SCT (Miss) 14
Worthy v Graham 149 So 2d 469 (Miss 1963) 9

OTHER

Griffith Miss Chancery Practice, 609 7, 8, 10
Griffith Miss Chancery Practice, 612 10
(Declared Lawyers Bible by MS Sup Court)

OPINIONS BELOW

1. Mississippi Supreme Court – filed 1 Jul 2004

2. Mississippi Court of Appeals – Rehear Denied – filed 17 Dec 2002

3. Mississippi Court of Appeals – filed 1 Oct 2002

4. Trial Court Order dated 14 Jul 99, filed 22 Jul 99

5. Trial Court Bench Ruling dated 3 Aug 99, filed 3 Aug 99

6. Federal District Court for the Northern District of Mississippi - filed 4 Oct 99

7. Federal District Court for the Northern District of Mississippi-Rehear Denied – filed 21 Oct 99

8. 5th Circuit Court of Appeals Non-published- No precedence - filed 25 Jul 2000

9. 5th Circuit Court of Appeals
Rehear Denied – filed 22 Aug 2000

JURISDICTION

Petition for Writ of Certiorari to this Court is based upon the Mississippi Supreme Court's judgment filed 1 July 2004. The Mississippi Supreme Court had granted Writ of Certiorari from the Mississippi Court of Appeals order, rehear denied 17 Dec 2002. Rehear by the Mississippi Supreme Court is not allowed pursuant to MRAP 17. The jurisdiction of the United States Supreme Court is believed to be invoked pursuant 28 USC 1257 (a) and United States Constitution Art III Section 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution Bill of Rights Art XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mississippi Constitution Art 1 Sect 1

The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

Mississippi Constitution Art 3 Sect 14

No person shall be deprived of life, liberty, or property except by due process of law.

Mississippi Constitution Art 3 Sect 24

All courts shall be open; and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial or delay.

Mississippi Constitution Art 4 Sect 33

The legislative power of this state shall be vested in a legislature which shall consist of a senate and a house of representatives.

Mississippi Constitution Sect 155

The judges of the several courts of this state shall, before they proceed to execute the duties of their respective offices, take the following oath or affirmation, to-wit: "I, _____, solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I _____ will faithfully and impartially discharge and perform all the duties incumbent upon me as according to the best of my ability and understanding, agreeably to the Constitution of the United States and the Constitution and laws of the state of Mississippi. So help me God."

Mississippi Constitution Sect 165

No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties. Whenever any judge of the Supreme Court or the judge or chancellor of any district in this state shall, for any reason, be unable or disqualified to preside at any term of court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the governor may commission another, or others, of law knowledge, to preside at such term or during such disability or disqualification in the place of the judge or judges so disqualified.

Statutes

Mississippi Code Annotated 9-1-105

SEC. 9-1-105. Physical disability or sickness; absence of judicial officer from state, etc.; appointment of special judge to serve on emergency basis.

(1) Whenever any judicial officer is unwilling or unable to hear a case or unable to hold or attend any of the courts at the time and place required by law by reason of the physical disability or sickness of such judicial officer, by reason of the absence of such judicial officer from the state, by reason of the disqualification of such judicial officer pursuant to the provision of Section 165, Mississippi Constitution of 1890, or any provision of the Code of Judicial Conduct, or for any other reason, the Chief Justice of the Mississippi Supreme Court, with the

advice and consent of a majority of the justices of the Mississippi Supreme Court, may appoint a person as a special judge to hear the case or attend and hold a court.

(2) Upon the request of the Chief Judge of the Court of Appeals or the senior judge of a chancery or circuit court district, the Chief Justice of the Mississippi Supreme Court, with the advice and consent of a majority of the justices of the Mississippi Supreme Court, shall have the authority to appoint a special judge to serve on an emergency basis in a circuit or chancery court. It shall be the duty of any special judge so appointed to assist the court to which he is assigned in the disposition of causes so pending in such court.

(3) When a vacancy exists for any of the reasons enumerated in Section 9-1-103, the vacancy has not been filled within seven (7) days by an appointment by the Governor, and there is a pending cause or are pending causes in the court where the vacancy exists that in the interests of justice and in the orderly dispatch of the court's business require the appointment of a special judge, the Chief Justice of the Supreme Court, with the advice and consent of a majority of the justices of the Mississippi Supreme Court, may appoint a qualified person as a special judge to fill the vacancy until the Governor makes his appointment and such appointee has taken the oath of office.

(4) If the Chief Justice pursuant to this section shall make an appointment within the authority vested in the Governor by reason of Section 165, Mississippi Constitution of 1890, the Governor may at his election appoint a person to so serve. In the event that the Governor makes such an appointment, any appointment made by the Chief Justice pursuant to this section shall

be void and of no further force or effect from the date of the Governor's appointment.

(5) When a judicial officer is unwilling or unable to hear a case or unable or unwilling to hold court for a period of time not to exceed two (2) weeks, the trial judge or judges of the affected district or county and other trial judges may agree among themselves regarding the appointment of a person for such case or such limited period of time. The trial judges shall submit a notice to the Chief Justice of the Supreme Court informing him of their appointment. If the Chief Justice does not appoint another person to serve as special judge within seven (7) days after receipt of such notice, the person designated in such order shall be deemed appointed.

(6) A person appointed to serve as a special judge may be any presently sitting or retired chancery, circuit or county court judge, Court of Appeals judge or Supreme Court Justice, or any other person possessing the qualifications of the judicial office for which the appointment is made; provided, however, that a judge or justice who was retired from service at the polls shall not be eligible for appointment as a special judge in the district in which he served prior to his defeat.

(7) Except as otherwise provided in subsection (2) of this section, the need for an appointment pursuant to this section may be certified to the Chief Justice of the Mississippi Supreme Court by any attorney in good standing or other officer of the court.

(8) The order appointing a person as a special judge pursuant to this section shall describe as specifically as possible the duration of the appointment.

(9) A special judge appointed pursuant to this section shall take the oath of office, if necessary, and shall, for the duration of his appointment, enjoy the full power and authority of the office to which he is appointed.

(10) Any presently sitting justice or judge appointed as a special judge under this section shall receive no additional compensation for his or her service as special judge. Any other person appointed as a special judge hereunder shall, for the period of his service, receive compensation from the state for each day's service a sum equal to 1/260 of the current salary in effect for the judicial office; provided, however, that no retired chancery, circuit or county court judge, retired Court of Appeals judge or any retired Supreme Court Justice appointed as a special judge pursuant to this section may, during any fiscal year, receive compensation in excess of twenty-five percent (25%) of the current salary in effect for a chancery or circuit court judge. Any person appointed as a special judge shall be reimbursed for travel expenses incurred in the performance of the official duties to which he may be appointed hereunder in the same manner as other public officials and employees as provided by Section 25-3-41, Mississippi Code of 1972.

(11) If any person appointed as such special judge is receiving retirement benefits by virtue of the provisions of the Public Employees' Retirement Law of 1952, appearing as Sections 25-11-1 through 25-11-139, Mississippi Code of 1972, such benefits shall not be reduced in any sum whatsoever because of such service, nor shall any sum be deducted as contributions toward retirement under said law.

(12) The Supreme Court shall have authority to prescribe rules and regulations reasonably necessary to

implement and give effect to the provisions of this section.

(13) Nothing in this section shall abrogate the right of attorneys engaged in a case to agree upon a member of the bar to preside in a case pursuant to Section 165 of the Mississippi Constitution of 1890.

(14) The Supreme Court shall prepare the necessary payroll for special judges appointed pursuant to this section and shall submit such payroll to the Department of Finance and Administration.

(15) Special judges appointed pursuant to this section shall direct requests for reimbursement for travel expenses authorized pursuant to this section to the Supreme Court and the Supreme Court shall submit such requests to the Department of Finance and Administration. The Supreme Court shall have the power to adopt rules and regulations regarding the administration of travel expenses authorized pursuant to this section.

SOURCES: Laws, 1989, ch. 587, Sec. 3; 1991, ch. 373, Sec. 2. Laws, 1993, ch. 518, Sec. 17, eff July 13, 1993 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the amendment of this section).

Mississippi Code Annotated 11-53-79

It shall be the duty of the clerks of the circuit and chancery courts, and of the sheriff, to post in a conspicuous place in his office, and each justice of the peace at his place of holding court, a copy of the bill of fees which he is entitled to receive, and on failure to do so

he shall not be entitled to receive or collect any fee for any service rendered during the time of such failure.

SOURCES: Codes, 1857, ch. 8, art. 11; 1880, Sec. 2394; 1892, Sec. 899; 1906, Sec. 976; Hemingway's 1917, Sec. 685; 1930, Sec. 692; 1942, Sec. 1603.

Mississippi Code Annotated 25-7-9

(1) The clerks of the chancery courts shall charge the following fees:
(a) For the act of certifying copies of filed documents, for each complete document $1.00

Mississippi Code Annotated 9-1-17

The Supreme, circuit, chancery and county courts and the Court of Appeals shall have power to fine and imprison any person guilty of ←contempt→» of the court while sitting, but the fine shall not exceed One Hundred Dollars ($100.00) for each offense, nor shall the imprisonment continue longer than thirty (30) days. If any witness refuse to be sworn or to give evidence, or if any officer or person refuse to obey or perform any rules, order, or judgment of the court, such court shall have power to fine and imprison such officer or person until he shall give evidence, or until the rule, order, or judgment shall be complied with.

SOURCES: Codes, Hutchinson's 1848, ch. 53, art. 2 (177), ch. 54, art. 2 (48); 1857, ch. 61, art. 37, ch. 62, art.

4; 1871, Secs. 538, 980; 1880, Sec. 2273; 1892, Sec. 923; 1906, Sec. 999; Hemingway's 1917, Sec. 719; 1930, Sec. 741; 1942, Sec. 1656; Laws, 1928, ch. 42. Laws, 1993, ch. 518, Sec. 10, eff July 13, 1993 (the date the United States

Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the amendment of this section).

PETITION FOR WRIT OF CERTIORARI

Petitioner Howard C McDonald Jr prays that a Writ of Certiorari issue to review the actions of the Mississippi Supreme Court, the Mississippi Court of Appeals and the Lee County Mississippi Chancery Court as the constitutional violations afford no post deprivation relief and greatly depart from controlling United States Supreme Court and Mississippi Supreme Court Constitutional and stare decisis law, thereby a violation of the due process and equal protection of the laws provisions of both the United States and Mississippi Constitutions.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises from a Trial Court changing custody / support from a final custody order without prayer for relief, notice or opportunity to defend or hearing, the affirmance of contempt without due process and entry of orders without jurisdiction. On appeal, the Mississippi Appellate Courts failed to address the jurisdiction and validity of these orders as briefed, disregarded stare decisis decisions of both the United States and Mississippi Supreme Courts, disregarded the supreme authority of both the United States and Mississippi Constitutions, thereby denying due process and equal protection of the laws, denial of a meaningful appeal and creating a published opinion placing Mississippi children in harms way.

On 2 Apr 98 the final divorce decree by Chancellor Charles D Thomas was entered into Lee County Chancery Cause 95-0437 giving Howard C McDonald Jr full physical and legal custody of the minor children Carie and Leah. (Record 18 – 22) Neither party appealed.

On 28 Aug 98 Rosemary filed Complaint for Modification of Final Decree (Record 13 – 22) oddly supported by affidavit of Rosemary dated 10 Jun 98 (Record 17) some two months after final decree, alleging inability to pay court ordered attorney fees, visitation inadequacies yet only seeking relief in her prayer for specified visitation.

On 9 Sep 98 Howard filed Answer and Cross Complaint (Record 23 –27), denying Rosemary's allegations, raising unclean hands doctrine as to Rosemary and seeking relief of dismissal of Rosemary's Motion to Modify Decree and citation of Rosemary for Contempt requiring her to pay Court ordered Attorney fees and Court costs.

On 10 Sep 99 Order of Recussal, without the required reason, of the District Chancellors was filed. (Record 24)

On 3 Sep 98 then Ninth District Chancellor William L Griffin Jr was appointed to hear the case.

On 13 Oct 99 Rosemary filed Motion for Emergency Temporary Relief alleging no visitation since Jul 98 and seeking relief requiring Howard to show cause why visitation should not be allowed. (Record 29 – 33)

On 19 Oct 98 Response to Motion for Emergency Modification was filed denying Rosemary's allegation of no visitation again seeking relief in the form of dismissal. (Record 34 – 37)

On 11 Jan 99 William L Griffin Jr was appointed without consent of the parties as Special Chancellor in this case. (Record 40)

On 5 Feb 99 Rosemary's Attorney made Motion to Withdraw as Counsel of Record citing Rosemary had retained the American Civil Liberties Union. (Record 44 – 45)

On 9 Feb 99 an 18 Feb 99 hearing was set. (Record 46)

On 10 Feb 99 Howard Responded to Rosemary's Motion for a Continuance citing that she had been dilatory in her actions and that Rosemary's new Counsel was affiliated with the ACLU and its apparent attempt was to convert this simple matter into a constitutional quarrel seeking relief in the form of having the scheduled hearing on 18 Feb 99. (Record 47 – 48)

On 10 Feb 99 de facto Wiliam L Griffin Jr allowed Rosemary's Attorney to withdraw. (Record 49)

On 22 Feb 99 de facto Griffin Jr signed order continuing hearing set for 18 Feb 99 until 17 Mar 99 which was not filed until 1 Mar 99. (Record 59) This explains why Appellant Howard was at Court by himself that day.

On 3 Mar 99 Motion for Admission of Counsel Pro Hac Vice (Leslie J Cooper – American Civil Liberties Union Inc Gay and Lesbian Task Force New York) was filed. (Record 60 – 65)

On 1 Mar 99 an unsworn Oath of Office for William L Griffin Jr was filed into this case. (Record 66) THE OATH OF OFFICE INCLUDED IN THIS RECORD IS ALTERED TO NOW SHOW DE FACTO GRIFFIN JR TOOK THE OATH.

On 8 Mar 99 Rosemary filed out of time answer (without leave of the court) to Howard's Cross-Petition and Plaintiffs Motion for Contempt and for Additional Modification of Final Decree seeking relief in the form of Howard's cross petition to be denied, citing Howard for contempt and striking the visitation restriction to specify dates. (Record 69 – 72)

On 15 Mar 99 Howard Made Motion for Continuance as his Attorney had been out of Country and had just received the 8 Mar 99 pleading above. This Motion was

mysteriously omitted from the record however is shown in the docket sheet. (Record 12)

On 17 Mar 99 de facto Griffin Jr allowed ACLU Gay and Lesbian Task Force Attorney Leslie J Cooper pro hac vice. (Record 76)

On 17 Mar 99 a proposed agreement was read into the record. (Transcript Vol 3 of 7 pages 1 – 18)

On 26 Mar 99 Howard's Attorney Made Motion to Withdraw (Record 77 – 78)

On 2 Apr 99 Notice of Hearing for Plaintiffs Motion for Entry of Order was filed (Record 79). Hearing was set 6 Apr 99.

On 6 Apr 99 de facto Griffin Jr held hearing entering a final order denying Howard time to acquire new Counsel as his Attorney had moved to withdraw, and over objection entered this final order to include attorney fees and costs, settling all issues and even advising Appellant McDonald of his right to Motion the Court to have the order reconsidered. (Transcript Vol 4 of 7 pages 19 – 46)

On 23 Apr 99 the final order was filed into the file. (Record 117 – 119)

On 23 Apr 99 Rosemary made Motion to Correct Order pursuant to MRCP 60. (Record 120 – 124)

On 5 May 99 Order correcting mistake was entered, signed on 28 Apr 99 without hearing. (Record 125 – 126)

On 5 May 99 Rosemary filed Motion to Hold Clay McDonald in Contempt for Unreasonably Interfering with Her Visitation Rights alleging Howard to be in contempt for wherein Howard did not allow the minor children to leave with Rosemary's on again/off again homosexual partner, Nancy Evans, when she appeared to pickup the children without Howard being notified by Rosemary, even though Rosemary was at work and picked up the children after work and on a second

occasion for requiring positive identification before the children left. (Record 127 – 130)

On 6 May 99 Howard filed Notice of Appeal of the final order rendered 23 Apr 99 and 5 May 99. (Record 135)

On 25 Jun 99 de facto Griffin held hearing on Motion for Contempt. (Transcript Vol 5 of 7 page 47 – 183) Appeal filed. (1999-TS-01259)

On 3 Aug 99 de facto Griffin Jr, without Motion, Notice or opportunity to defend changed custody of the minor children Leah and Carie to Rosemary. (Transcript Vol 6 of 7 page 184 – 196) Appeal filed (1999-TS-01384)

On 27 Mar 2001 Lee County Chancery Clerk Bill Benson made Motion for Increase in Deposit. (Record 169) (Transcript Vol 7 of 7 pages 197 – 211)

ARGUMENT

This case involves the denial of Petitioners Constitutional Rights where no post deprivation relief lies. (Hellenic American Neighborhood Action Committee v City of New York citing Hudson v Palmers 468 US 531 and Logan v Zimmerman Brush Company, 455 US 422) Inconsistencies between the orders issued and the trial transcripts, to include the shown alteration of the record by the trial judge, provide adequate grounds to make any of the trial courts orders suspect to purposeful deprivation.

Constitutional Deprivation Without Relief

This deprivation lies in a state judge taking of children and money, without motion by the parties or due process hearing, resulting in a five year ongoing and continuous deprivation, without available post deprivation relief.

Federal Suit for these acts was filed in the Northern District Court of Mississippi, McDonald v Griffin, et al, 1:99CV226-D-D (Appendix 45-48), dismissed for judicial immunity, appealed US Court of Appeals 5th Circuit 99-60783, affirmed, (Appendix 50-53) upheld judicial immunity citing relief in state court, Writ of Certiorari denied by this Court, therefore not res judicata or collateral estoppell. The Mississippi Appellate Courts have opinioned they are without jurisdiction to rule if the deprivation is valid or not. (Appendix 1-31)

It is well settled that Change of Custody requires (1) Notice and Opportunity to Defend (2) a material change in circumstances that adversely affect the children. MRCP 81, Smith v Jones 654 So 2d 480, 486 (Miss 1995). These rules are the law Newell v State 308 So 2d 71 (Miss 1975) Before a Chancellor modifies custody there must be a material showing of a change in circumstances Bredemier v Jackson 689 So 2d 770 (Miss 1997) Ortega v Lovell No 97-CA-00241-SCT. Only parental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change. Morrow v Morrow 591 So 2d 829 (Miss 1991) Even denial of visitation does not warrant change of custody. Elliott v Elliott No 2002-CA-00846-COA, Creel 831 So 2d 1183, Spain v Holland 483 So 2d 318 (Miss 1986)

The total record concerning this change of custody is Transcript Vol 6 of 7 pages 184 – 196. Although stating outright lies it does show that custody of the children (Leah and Carie) and $600.00 per month to be transferred to Rosemary without motion by either party, due process hearing or reason. The transcript (inconsistent with orders issued) falsely states that custody was transferred to Rosemary during the contempt proceedings, which could not even have been

done as it would have been relief outside the pleadings and absent the required due process and proof required to do so. The trial Court proceeded to use custody as a punishment, a practice long not accepted by Mississippi Courts. (Phillips, 555 So 2d 701, Tucker v Tucker, 453 So 2d 1294, 1297 (Miss 1984) There was no Motion before the Court to change custody. As stated, the trial judge made his own Motion, although not a party to the case. The trial judge was there with co defendants C. Jackson Williams and Rosemary McDonald in Federal Case 1:99-CV-226 of which Howard was the Plaintiff. Not much fair and impartial judiciary here. The trial judge read a pre-typed order into the record ordering Appellant Howard to pay $600.00 per month child support and $750.00 attorney fees plus costs, therefore a final appeal able order. As such, there is no valid judgment. It is void as it acted in a manner inconsistent with due process of law. The trial court has no discretion in dealing with a void judgment and it must be set aside. (Bryant Inc v Walters 493 So 2d 933 (Miss 1986) Overby v Murray 569 So 2d 303 (Miss 1990) Bridges & Shelson, Griffith Mississippi Chancery Practice (2000 Ed) 609 The trial court had no jurisdiction. Jurisdiction must be exercised in conformity of fundamental principals of procedure. The trial court cannot refuse to permit a defendant to file an answer when tendered in the manner allowed by law, nor refuse to hear any evidence whatsoever, nor assume to enter a judgment orally and without any pleadings whatsoever. The Mississippi Supreme Court has held for change of custody/support to occur, the movant must show (1) notice and opportunity to defend (2) a material change that adversely affects the children. MRCP 81, Smith v Jones 654 So 2d 480, 486 (Miss 1995), Bredemier v Jackson 689 So 2d 770 (Miss 1997), Ortega v Lovell No

97-CA-00241-SCT, Lackey v Fuller 755 So 2d 1083 (Miss 2000). A change of custody absent Albright Factors is reversible err. Sturgis v Sturgis 792 So 2d 1020 (Miss Ct App 2001) A hearing must take place. Thompson v Thompson No 2000 CA-00087-CA Best interest of the child applies in both temporary and final orders. Dickerson v Dickerson 243 MS 370, 148 So 2d 510 (1963) Griffith Chancery Practice (2000 Ed) As such, all monies paid (approx $30,000.00) to Rosemary since Aug 99 and the children have been denied Howard without due process. Despite the orders of the lower Federal Courts, there was no child custody battle. Petitioner was the full custodial parent of his two smallest children pursuant to a final decree issued by the Lee County Mississippi Chancery Court. Rosemary did not appeal.

It is well settled that jurisdiction can be raised at any level. Once challenged it must be overcome with facts and law. (Hagen v Levine 415 US 528) One not appointed within the dictates of the constitution is without jurisdiction. (Ryder v US No 94-431, Ball v US 140 US 118, Norton v Shelby County 118 US 425)

William L Griffin Jr initially asserted judicial title through the 11 Jan 99 order of former Mississippi Supreme Court Justice Lenore Prather pursuant to MCA 9-1-105. At the time of appointment, Griffin Jr was an unemployed attorney. The voters of his district had chosen to remove him from office as of 31 Dec 98 after one term in office. Although in violation of Mississippi Constitution Sect 165 which designates the Governor to appoint in instances of recussal, MCA 9-1-105 allows the Chief Justice of the Supreme Court to appoint "a judge" upon recussal. Mississippi maintains a list of Senior Status Judges for such purpose and mandates removal from the list when Senior Status Judges refuse to hear cases. William L Griffin Jr did not qualify. Both the

Mississippi Constitution Sect 155 and MCA 9-1-105 (9) require the appointed Special Judge to take the required Oath of Office prior to proceeding. William L Griffin Jr did not. Although the altered William L Griffin Jr Oath (Record 66) now shows he took the oath, judicial notice is required that Howard's Petition for Stay of Enforcement of Judgment, United States District Court for the Northern District of Mississippi at Aberdeen Case 1:99-CV-226 and Mississippi Supreme Court No 2000-CA-1000 show Griffin Jr had not taken the prescribed oath and had criminally altered the oath to its present state. It should be noted that both the Mississippi Constitution Sect 165 and MCA 9-1-105 (13) specifically allow parties to agree on a member of the bar to be appointed upon agreement of the parties. Howard did not agree to Griffin Jr and the record void of Rosemary agreeing to Griffin Jr. Jurisdiction is limited by the pleadings. For a Court to award relief not requested in the pleadings is error and the defendant denied due process. (Diamond v Diamond 403 So 2d 129 (Miss 1981), Fortenberry v Fortenberry 338 So 2d 806 (Miss 1976), Miller v Miller 512 So 2d 1286 (Miss 1987). As such, William L Griffin Jr was without lawful authority or jurisdiction defacto or dejure to proceed in these matters or to issue any order.

It is well settled that a final order is one which has the effect of terminating the litigation. (Worthy v Graham 149 So 2d 469 (Miss 1963), Seaney v Seaney 218 So 2d 5 (Miss 1969), Legg v Legg 168 So 2d 58 (Miss 1964), Fortune v Lee County Board of Supervisors 725 So 2d 747 (Miss 1998). It is final and appeal able after entry by the Clerk. (Oneil v Oneil 551 So 2d 228 (Miss 1989), Cortesi v Cortesi, 566 So 2d 702 (Miss 1990), UCCR 5.06. A final judgment is complete after taxing costs. UCCR 5.02. A MRCP 60 Motion proceeds upon a valid and

enforceable final judgment. In this case the order of de facto Griffin Jr settled all issues raised and then some. It was also corrected pursuant to MRCP 60, therefore a final order.

William L Griffin Jr lacked jurisdiction to enter any order. However, even if Griffin Jr had jurisdiction, de facto or de jure, it was lost. The entry of the 6 Apr 99 order wherein Howard was denied a continuance to acquire new counsel and order entered did not give Howard the required 5 day notice. (MRCP 6) Jurisdiction must be exercised in conformity to fundamental principals of procedure. The fundamental principals cannot be set aside for convenience. Love v Miss Cotton Seed Prod Co 137 So 739 (Miss 1931)

The Mississippi Supreme Court has stated that orders are not valid until signed by the parties. In this case Howard did not sign the order. It was entered without signature. If the parties do not sign, it is not a consent judgment. UCCR 5.03, Democratic Executive Committee v Hatcher 168 So 2d 533 (Miss 1964). Judgments in Chancery must be in writing, oral not valid. Howard v Jayne, 86 So 752 (Miss 1926), Banks v Banks 511 So 2d 933 (Miss 1987) For a judgment in equity to be valid it (1) cannot adjudicate the rights or liabilities of persons not parties to the proceeding (2) relief must conform to the pleadings and proof (3) come within the demand for judgment. Barnes v Barnes 317 So 2d 387 (Miss 1975), Bridges & Shelson Griffith Mississippi Chancery Practice (2000 Edition 612 In this case the de facto court sought to adjudicate perceived relief for Nancy Evans, on again/off again homosexual partner of Rosemary. As such, it was err for the order of de facto Griffin Jr to remove the homosexual visitation restriction as Nancy Evans was not a party to the case, was in err altering the bills previously awarded by final decree, was not a valid

consent judgment and did not allow Howard due process. This judgment being void must be set aside. Bryant v Walters 493 So 2d 933 (Miss 1986) Overbey v Murray 569 So 2d 303 (Miss 1990)

The Change of Legislative Statute Without Constitutional Challenge

On appeal, Howard estimated cost on appeal pursuant to MCA 25-7-9 and made payment to the Clerk. Some two (2) years later and after two Petitions for Writ of Mandamus to force the Clerk to move the record, Lee County Chancery Clerk William Bill Benson made Motion for an additional amount of $956.00. (Record 169) De facto Griffin Jr heard testimony from Benson who claimed costs pursuant to MCA 25-7-13 (those of the Circuit Clerk). To further this err, Clerk Benson has continuously refused to post fees as required by MCA 11-53-79 thereby voiding his entitlement to those fees. In total disregard for Mississippi Supreme Court Justice Oliver Diaz (presently under Federal Indictment for influencing MS Supreme Court Decisions) consolidation order, Mississippi Legislative statute and Clerk Bensons request for $956.00, De facto Griffin Jr ordered $1106.00 to be paid. As such, de facto Griffin Jr, without lawful authority or jurisdiction, further erred and abused any discretion ordering additional costs of $1106.00, in violation of Mississippi statute.

Contemptuous Conduct

Note: The record designated on appeal for this issue was not included. The transcript of the hearing was. In an abundance of caution, Howard will address this issue as best can with what the clerk sent, reserving his right to

further address this issue should the courts ever force the Clerk to follow MRCP / MRAP.

This very Court made clear the parental rights and responsibilities of custodial parents in (Troxel v Granville No 99-138) wherein a mother was found to best control the visitation to the natural grandparents. In this case, the Mississippi Courts totally ignored this ruling finding the custodial natural father in contempt for not releasing his children to the on again/off again homosexual partner of the mother, without notice from the mother or the mother missing any visitation time. Certainly an on again/off again homosexual partner has no more right to children than a natural grandparent.

Rosemary made Motion to Hold Howard in Contempt alleging that Howard failed to release the children to her on again/off again homosexual partner while she was at work. Rosemary did not notify Howard anyone would be coming to get the children for her. Rosemary alleged this violated the appealed Court order of de facto Griffin Jr. Howard filed several Motions before the hearing in this matter. They were mysteriously excluded from the record. However the transcript does show that (1) de facto Griffin Jr denied Motion for Recussal (Transcript 53) (2) denied Petition to Dismiss MRCP 12 (b) (Transcript 54 – 56) (3) did not allow Petitions for Admissions or Discovery requiring Howard to have to wing it during the hearing (Transcript 56 – 60) (4) denied Summary Judgment dismissing Rosemary Contempt (Transcript 60 –62) (5) denied jury trial although proceeding with two contempt charges at once (Transcript 64 – 66) cumulatively addressed (Transcript 69 – 72)

Over objection the de facto court proceeded to try both contempt allegation at once. (Transcript 72 – 73)

Rosemary testified that she on occasion could not get the children at the prescribed time due to work, that she had sent the agreed responsible person (Sister Heather) to get them. She even offered to get them at a later time. (Transcript 83 –84) She then testified as to an event in the future which would include her on again/off again homosexual partner Nancy Evans. On cross examination, Rosemary admitted to changing her work schedule, that she was at work on the dates she claims her visitation was interfered with (Transcript 100 – 101) that Howard had allowed her to pick up the children at a later time (Transcript 102) Although not listed as a responsible person in the Courts appealed order, Rosemary asserted Nancy Evans to be a responsible person, admitted that Nancy Evans, her on again/off again homosexual partner had been through detox, went to AA meetings yet still consumed alcohol. (Transcript 110 – 113) Strangely de facto Griffin Jr acknowledged Nancy Evans was not a party to this case. (Transcript 139) Howard was required to testify (5th Amendment pled and denied) wherein after expressing his intent on any legal remedy available to him to preclude Nancy Evans from the children (Transcript 140 – 146) De facto Griffin Jr stopped the hearing and had the two children (Carie and Leah) picked up by a deputy sheriff from the nursery and home and brought to the Courtroom. (Transcript 146) Howard was limited to seven (7) minutes for his testimony (Transcript page 156) Howard gave quick narrative for his direct examination (Transcript 156 – 161) with depositions concerning drug abuse by Rosemary being admitted, yet excluded in the appeal record. Howard called Mrs Howard McDonald (mother of Howard) who testified to Nancy Evans kicking her car, using vulgar language. (Transcript 164 –

166) De facto Griffin Jr was of the opinion that pursuing legal remedies was thwarting his court (Transcript 170) and immediately changed an appealed order giving Rosemary extended visitation commencing that day through 3 Aug 99. (Transcript 171 – 172) and finding Howard in "direct" Contempt for alleged acts outside the courts presence. (Transcript 177)

Of importance is the issue of jurisdiction. Even if de facto Griffin Jr had any jurisdiction in the appealed order of 6 Apr 99, it ended upon his order and appeal of that order. De facto Griffin was not appointed to hear this matter in any manner therefore absent any jurisdiction. (Barton v Barton No 95-CT-01020-SCT) To further this issue Howard was denied a jury trial although he was being tried on two charges of contempt. (Walls v Spell, No 97-CA-00378-SCT citing Codispoti v Pennsylvania 418 US 506 (1974) Howard received removal of his children, $1500.00 monetary and unknown jail time, although not included in the Record, yet designated. Appeal was filed. (1999-TS-01259)

Howard did not carry a key to his own release therefore this was a criminal contempt proceeding. (Purvis v Purvis 657 So 2d 794 (Miss 1994) Lahman v Hallmon 722 So 2d 614 (Miss 1998) affording Howard all due process protections. Further Howard should have been tried by another judge as de facto Griffin Jr had personal involvement. Terry v State 718 So 2d 1097 (Miss 1998) Walls v Spell 722 So 2d 566 (Miss 1998)

The record is void of any violation of the appealed order, much less a willful violation. One only has to read the transcript of this proceeding (Transcript 47 – 183) to see a clear effort on the part of De facto Griffin Jr to try and steer a conviction in this matter. Mr. McDonald sought discovery and the determination of whether this was civil or criminal contempt. Both were denied.

Failure is reversible err. McKee v McKee 7 So 2d (Miss 1942) Howard was denied a competent, fair and impartial judge, thereby a denial of due process under the due process clauses of both the US and Mississippi Constitutions. Of note is Mississippi has adopted the approach, one has to go to court, see what sentence they receive, and then on appeal it will be determined if it is civil or criminal contempt. (Appendix 1-31) Contmept powers are limited by statute. MCA 9-1-17 How does one prepare ?

Yet Mississippi has long held even moving to another state which denies visitation is not contemptible and certainly not reason for change of custody. Elliott v Elliott No 2002-CA-00846-COA, Creel 831 So 2d 1183, Spain v Holland 483 So 2d 318 (Miss 1986) A valid judgment requires (1) jurisdiction (2) due process of law. A void judgment is just that, void. A litigant cannot be held in contempt of a void judgment. Roberts v Roberts 866 So 2d 474 (Miss App 2003) citing Bryant v Walters 493 So 2d 933 938 (Miss 1986) and McKinney v McKinney 374 So 2d 230, 234 (Miss 1979)

Meaningful Appeal

The Constitutions are clear. *No person shall be deprived of life, liberty or property except by due process of law.* MS Constitution Art 3, Sect 14 It cannot be doubted that the due process clause of the 14th amendment protects fundamental rights of parents and prohibits the state from depriving any person life, liberty or property without due process of law. Troxel v Granville 530 US 2000 The due process clause of the 14th amendment requires more than fair process. Washington v Glucksburg 521 US 702, 719 (1977) There is no doubt that Howard had custody removed and support of

$600.00 per month (now approx $30,000.00) without hearing or due process (unless due process is open court, read a pretyped order, close court). In its decision, the Mississippi Appellate Courts have redefined due process and equal protection of the laws in conflict with both the United States and Mississippi Constitutions, stare decisis decisions of both the United States and Mississippi Supreme Courts and legislative law.

The trial court and Mississippi Appeals Courts decisions place children in harms way. It places parents in a position to be forced to release their children to strangers, homosexuals and drug addicts, just because they show up, without notice by the other parent, for fear of punishment through contempt and change of custody/support proceedings, all with the parent receiving visitation being at work and not missing any time with the children. If it is true all laws are enacted or passed for the health, safety and welfare of the public, the Court of Appeals decision is contrary to this principle. Further, the criminal violations of altering the record by both the Clerk and de facto judge was ignored by the Mississippi Appellate Courts, which is of great importance to the public in determining the credibility of the Mississippi Judicial system which serves them.

Court of Appeals Exceeded Its Jurisdiction

Issue was raised at trial and appeal that the Chancery Clerk violated MCA 25-7-9 and 11-53-79 by requesting fees pursuant to MCA 25-7-13 (Circuit Clerk fees) No constitutional challenge was made by either party. While sanctioning Howard for not giving separate specific notice of challenge to one statute, the Mississippi Appeals Courts allows this statute to be changed without

any such notice. (Appendix 1-31) It is well established Mississippi has three branches of government i.e. legislative, executive and judicial. All lawmaking is reserved to the legislative. MS Const Art 4 Sect 1 The judicial cannot change legislative law without constitutional challenge. Rohrbacher v City of Jackson 51 Miss 735 In this case the Court of Appeals ignored legislative statute and constitutional jurisdiction in issuing a published opinion changing legislative law without a constitutional challenge or required notice.

Mr. McDonald timely appealed all three orders in these consolidated cases. After two writs of Mandamus only a portion of the designated record was forwarded (some 2 ½ years later, although Rule is 60 days). The Court of Appeals did not rule on the issues raised on appeal and refused to address them on Petition for Rehear. Notice of Rehear denial was not received until 24 Dec 02, some 7 days after filing, requiring expedient Petition for Writ of Certiorari to the Mississippi Supreme Court within the 14 day limit and without benefit of use of law library as University of Mississippi and Memphis are limited for holidays. Remedy is guaranteed by due course of law without sale, denial or delay. US Constitution Bill of Rights XIV and Mississippi Constitution Art III Sect.14, 24. When a state opts to establish an appeals system, it must act in accord with the dictates of the constitution and in particular with the due process clauses. Evitts v Lucey 469 US387 (1985) Howard filed Motion to Strike Appellee Brief for out of time. The Mississippi Court of Appeals ignored or refused to rule on the Petition both on initial appeal and on rehear. The Mississippi Supreme Court ordered it a moot issue.

REASONS FOR GRANTING THE WRIT

Initially, this case would appear complicated as the various issues raised on appeal in the state courts were not fully addressed and the opinions worded carefully try to protect from jurisdiction issues. Yet this case is simple. It is indicative of a court with a predetermined outcome and trying to back into a legal result. A "Special Judge" was appointed who had previously been previously successfully sued by the ACLU in California. (This was found out later) This "Special Judge" was challenged and offended, self appointing himself to an additional six months in his first order, inviting further litigation. When faced with a thorough defense in the contempt hearing, he failed to follow the law. When sued in Federal Court, he admitted to due process violations, claiming and receiving absolute judicial immunity. In retaliation, the de facto judge took Howards children and 600.00 per month without either party motion or due process hearing. On state appeal, the courts have tried to justify the person they appointed "Special Judge" leading to the multitude of irregularities. It is obvious, the Mississippi Courts are not willing or able to correct these matters according to their long held stare decis decisions. The questions remain, Why is Howard being treated differently than those before him ?

This Court has carefully defined parental rights as a liberty protected by the Due Process Clause. Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923). On June 5, 2000, this Court declared that [I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. Troxel v.Granville (530 U.S. 2000) Fundamental Constitutional rights are accorded a special

status in judicial review. The Fourteenth Amendment prohibits the state from depriving any person of "life, liberty, or property, without due process of law." This Court has long recognized that the Due Process Clause "guarantees more than fair process." Washington v. Glucksberg, 521 U.S. 702, 719 (1997). It also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." Id., at 720; see also Reno v. Flores, 507 U.S.292, 301302 (1993).The level of scrutiny required for state actions that infringe upon fundamental rights is "strict scrutiny", which requires the state to show that the infringement serves a "compelling state interest" and that there is no Constitutionally less offensive way for the state to satisfy this compelling interest. There are sweeping, though seldom appreciated, implications of recognizing parental rights as Constitutionally fundamental. This is true regardless of whether the interference with the right is permanent, temporary, or pendente lite. This Court has held that the deprivation of fundamental liberty rights "for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 96 S.Ct. 2673; 427 U.S. 347, (1976). Under the strict scrutiny standard, such a deprivation of rights must occur only when there is a compelling state interest served by interfering with these rights and there is no more Constitutionally benign way to achieve this compelling state interest. While it is uncontroversial that, under the parens patria doctrine, the state has a compelling interest in preventing harm to children, this interest is not sufficient to Constitutionally justify the infringement in question. As the Court declared in Troxel: [S]o long as a parent adequately cares for his or her children (i.e., is

fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. Troxel, op. cit. Parental rights are among the strongest protected constitutional rights enjoyed and stringently upheld by this Court. (Troxel v Granville No 99-138) This does not extend to on again/off again homosexual partners, private political groups such as the ACLU, the state or its actors absent emergency circumstances or usurpers of judicial power carrying out personal vendettas. This Court has itself ruled that when a de jure judge goes outside the Constitutions and laws, it exercises no discretion and becomes a minister of its own prejudice. The United States and Mississippi Constitutions guarantee remedy by due course of law a remedy without sale, denial or delay. (US Constitution Bill of Rights XIV and Mississippi Constitution Art III Section 14, 24) If this is allowed to stand, there is no remedy for Howard in violation of the constitutions. The denial of applying these well traveled and known (plead to the courts) rules of civil procedure, case laws and constitutional guarantees deny due process and equal protection of the law under both the United States and Mississippi Constitutions.

This case exemplifies the very reason our founding fathers included due process and equal protection in both the United States and Mississippi Constitutions. Howard had children and to date approximately $30,000.00 taken, without party motion, due process hearing or emergency circumstance, which has lasted over five years. The Mississippi Court of Appeals did not find due process err and the Mississippi Supreme Court has ruled it has no jurisdiction to rule this deprivation invalid or provide relief. Three of Mississippi's highest judges recognized

this grave err with dissenting opinion. The Federal Courts dismissed Howard's lawsuit pursuant to judicial immunity, claiming relief was in the state courts. As such, there is no post deprivation relief.

From its beginning, the trial court treated Howard in a manner inconsistent with the Mississippi Rules of Civil Procedure, state and federal law, United States and Mississippi Constitutions. On appeal, the trial court did not forward the record designated or follow Mississippi Appellate Rules. On appeal, the Court of Appeals ignored or treated Howard differently than those before and after him, in following Court rules, state and federal law, stare decisis decisions and the constitutions. It is apparent to all, the more the Courts try to justify this deprivation, the more bizarre these violations have become. The Mississippi Appellate Courts even recently reversed a Chancery Court order which ordered the mother to take a child to the natural grandparents home one weekend a month for visitation with the father, as the grandparents were not a party to the cause or relief ask for. Givens v Nicholson No. 2002-CA-01582-COA (Miss) This Court should grant Petition for Writ of Certiorari, review the briefs and record sent on state appeal, granting Howard immediate relief sought in his briefs so as to provide him Constitutional due process and equal protection of the laws under both the constitutions and laws of the United States and Mississippi and further use its supervisory / highest court of the land powers to provide a clear application of the Constitutions, laws, rules and Oaths of Office in these matters. There was no state interest upon which the Court to act (such as danger to the child). The taking of children from a caring custodial parent without motion, hearing or reason does not justify this state action. The taking of $600.00 per month is devastating on the average minimum wage

earner. How is one compensated for the loss of family association, lost use of money during this time, or loss of *tax deductions and benefits, just* to name a few ? The finding of contempt under these circumstances horrendous. For if relief in this Court is denied, where then is constitutional relief to be found ?

This the 10th day of August 2004.

HOWARD C MCDONALD JR
411 North Joann Street
Tupelo, MS 38801
662-844-5869

APPENDIX 1

IN THE SUPREME COURT OF MISSISSIPPI
NO. 1999-CT-00848-SCT
CONSOLIDATED WITH
NO. 1999-CT-01259-SCT
CONSOLIDATED WITH
NO. 1999-CT-01384-SCT

HOWARD CLAYBORNE MCDONALD JR

V.

ROSEMARY SHEFFIELD MCDONALD

ON WRIT OF CERTIORARI

DATE OF JUDGMENT: 3/17/1999; 7/14/1999; 8/03/1999
TRIAL JUDGE: HON. WILLIAM L. GRIFFIN, JR.
COURT FROM WHICH APPEALED: LEE COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT: PRO SE
ATTORNEY FOR APPELLEE: RICHARD L. JONES
NATURE OF CASE: CIVIL-DOMESTIC RELATIONS
DISPOSITION: AFFIRMED-07/01/2004
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

EN BANC.

SMITH, CHIEF JUSTICE, FOR THE COURT:

¶ 1. This case is before the Court on the issues of child custody and contempt. Howard Clayborne McDonald, Jr. argued that the special chancellor

presiding in this case erred in changing custody of his two youngest children from him to his ex-wife, and in holding him in contempt. The Court of Appeals affirmed the judgment of the special chancellor. *McDonald v. McDonald* , 850 So. 2d 1152 (Miss. Ct. App. 2002). We granted certiorari and after due consideration, we affirm the Court of Appeals and the chancellor.

FACTS

¶ 2. When Howard McDonald was granted a divorce from Rosemary Sheffield McDonald in April of 1998, the Lee County Chancery Court awarded him custody of their two younger daughters, and Rosemary received custody of their oldest daughter. Both parents were granted reasonable visitation, but the chancery court order prohibited visitation in the presence of anyone with whom Rosemary was having an affair. Five months later, Rosemary filed for modification of the final decree, stating that Howard had violated the court's visitation order. Due to the recusal of all three of the Lee County chancellors, Special Chancellor William L. Griffin, Jr., was appointed to preside at the hearing on this matter, and he modified the divorce decree to establish more specific terms for visitation. His order, entered April14, 1999, was to be temporary [1], and from that order Howard filed his first appeal, in case no. 1999-CA-848.

¶ 3. In May 1999 Rosemary filed a motion for contempt against Howard, saying that he had once again interfered with her visitation rights. After a hearing Howard was found in contempt, ordered to pay $1500 in attorney fees, and also ordered to immediately turn over the two younger daughters to Rosemary for extended visitation with her until August 1999. The special chancellor also scheduled a hearing at the end of the visitation period, to

review the visitation/custody status. Aggrieved, Howard filed his second appeal, in case no. 1999-CA-1259.

¶ 4. In July 1999, Howard McDonald filed a suit in federal district court against the special chancellor and others. [2] That suit notwithstanding, the chancery hearing proceeded on August 3, 1999, and the special chancellor entered an order granting temporary custody of the children to Rosemary, ordering Howard to pay child support, and setting a visitation schedule. Howard then filed his third appeal, no. 1999-CA-1384. The appeals were consolidated and assigned to the Court of Appeals. The Court of Appeals affirmed, finding that the special chancellor had proper legal authority to act in this case; that an order to which Howard agreed during a hearing was properly entered, even if he subsequently refused to sign the order; that the chancery clerk and the chancery court had properly computed the appeal costs; that the finding of contempt against Howard was justified by the evidence; and that there was no error in changing custody of the children temporarily by order of August 11, 1999.

¶ 5. Aggrieved, Howard McDonald petitioned for certiorari in propria persona and this Court granted certiorari.

¶ 6. After thorough review and consideration, we affirm the Court of Appeals in all respects.

ANALYSIS

¶ 7. The following language appears in the special chancellor's decision:

> The Court, upon receipt of the D.H.S. report and on the motion of either party, may schedule a hearing for the limited

> purpose of addressing any custody issues which might be raised by the D.H.S. report and which are contrary to today's temporary order. If the D.H.S. report and its recommendations are consistent with today's temporary order, then no hearing will be scheduled.

The chancellor also stated in the decision that "[t]he [c]ourt, therefore, makes the following temporary ruling with regard to child support, visitation and the custody of those minor children . . ." The chancellor's intention was clearly to determine custody temporarily until he could resume the proceedings with a full hearing on the merits pertaining to permanent custody of the children and other matters that are still before the court. Therefore, we do not have jurisdiction to hear the appeal. The following is a more complete excerpt supporting this interpretation:

> This Court is of the opinion that pending a resolution of the United States District Court action with regard to William L. Griffin, Junior, all matters now pending before the Court in this cause should be held in abeyance.
>
> It is the ruling of this Court that out of an abundance of caution and pending a resolution with regard to William L. Griffin, Junior, of that United States District Court action heretofore filed by Howard Clayborne McDonald, Junior, all matters pending before the Court will be held in abeyance.

APPENDIX 5

> **There will be no hearing today; however, there are two children before the Court whose future custody and support must be, at least, temporarily addressed pending the resolution of the United States District Court action.**

The following sentence from the chancellor's opinion is crucial: "The Court, upon receipt of the D.H.S. report and on the motion of either party, may schedule a hearing for the limited purpose of addressing any custody issues which might be raised by the D.H.S. report and which are contrary to today's temporary order ." (emphasis added). The chancellor then continued with "If the D.H.S. report and its recommendations are consistent with today's temporary order, then no hearing will be scheduled." We find that the "hearing" referred to in the second sentence refers to the type of "hearing" discussed in the first sentence. The chancellor's statements here do not overrule his earlier statement that the proceedings, including a full hearing on the merits with regard to permanent custody will be held when the federal district court matter has been resolved.

¶ 8. The Court of Appeals was correct in its assertion that "[t]he order invited further motions to address custody and support issues. The impediment of the then-pending federal suit against the special chancellor has been removed. We find nothing to review about this explicitly temporary order entered three years ago. *Michael v. Michael* , 650 So. 2d 469, 471 (Miss. 1995) (appellate review of temporary orders is improper.)" *McDonald v. McDonald* , 850 So. 2d 1182, 1193 (Miss. Ct. App. 2002).

¶ 9. Furthermore, the Court of Appeals also ruled that it found "no procedural irregularity in the hearing on the

temporary order. . . . The special chancellor made appropriate findings for why he was temporarily changing custody, including Howard McDonald's interference with his former wife's visitation with the children who were in his custody." *Id*.

¶ 10. The evidence in the record supports the contention that the change of custody was intended to be temporary until the trial court could hold a full hearing on the merits after the litigation pending in federal district court was over. For this reason, the order was not final and permanent, and this Court does not have jurisdiction to review the change of custody.

¶ 11. We have carefully considered the remaining assignments of error and find that they are without merit. We affirm the judgments of the Court of Appeals and the trial court.

¶ 12. AFFIRMED.

WALLER, P.J., CARLSON, GRAVES AND RANDOLPH, JJ., CONCUR. COBB, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY EASLEY AND DICKINSON, JJ. DIAZ, J., NOT PARTICIPATING.

COBB, PRESIDING JUSTICE, DISSENTING:

¶ 13. This case is a consolidation of three appeals by Howard McDonald, Jr. The majority determined that this Court lacks jurisdiction because the third appeal involved an order for temporary child custody. There are several reasons why I respectfully dissent. First, there are three orders on three different dates appealed from which involve child custody and visitation. The first order modified restrictions that were initially placed on

Rosemary's visitation rights; the second order found Howard in contempt for interfering with visitation rights; and the third order, without the benefit of a hearing on the merits, or an emergency situation, modified the existing "permanent" custody granted to Howard, by stating that even though there would be no hearing held, he was "temporarily" modifying custody. There is no issue that the first two orders are appealable, and in my view, so is the third. As we have stated, "[i]t is often said that no child custody order is permanent. Technically, this is correct because custody is always subject to modification in the best interest of the child." *Blevins v. Bardwell* , 784 So. 2d 166, 170 (Miss. 2001). Custody and visitation orders are routinely appealed despite their modifiable, thus temporary, nature.

¶ 14. From the record, it appears that the chancellor had no intention of conducting a hearing on the merits of the custody modification, thus the temporary custody was actually permanent in nature. In his bench ruling after the August 3 trial, the chancellor made the following statements:

> **There will be no hearing today; however, there are two children before the Court whose future custody and support must be, at least, temporarily addressed pending the resolution of the United States District Court action. [3]**
>
> **. . .**
>
> **Until further order of this Court, the temporary custody of Leah and Carie McDonald, two of the minor children of the parties, is granted to Rosemary McDonald . . .**

APPENDIX 8

> **The Court, upon the receipt of the D.H.S. report and upon the motion of either party, may schedule a hearing for the limited purpose of addressing any custody issues which might be raised by the D.H.S. report and which are contrary to today's temporary order. If the D.H.S. report and its recommendations are consistent with today's temporary order, then no hearing will be scheduled.** [4]

Thus, unless the D.H.S. report was contrary to his ruling and convinced the chancellor that he had to again modify custody, the decision to modify custody was permanent and without a hearing. Additionally, the chancellor stated:

> **In fairness, particularly, to Mr. McDonald, the Court may, upon the motion of either party and after Mr. McDonald's full compliance with Chancery Court Rule 8.05, schedule a hearing for the limited purpose of addressing the issue of child support.**

Based on this language, it is reasonable to believe that the chancellor had no intention of scheduling a hearing base on the issue of custody modification. The fact that three years has elapsed without a hearing since the August 16 appeal from this order supports this conclusion.

APPENDIX 9

¶ 15. The chancellor chose not to hold a hearing when he modified the previously awarded permanent custody of the children. [5] The fact that the chancellor termed his modification of custody "temporary," in my view in no way relieves him of his responsibility to abide by Mississippi law, particularly in this non-emergency setting. "When a decree of custody is to be made or modified in substantial or major aspects, a proper notice and opportunity to be heard must be given to the adverse party." *Gordon v. Gordon*, 196 Miss. 476, 17 So. 2d 191 (1944). Although both parties were present for a hearing, the chancellor allowed no testimony or evidence to be submitted, but simply modified custody, albeit "temporarily." [6]

¶ 16. It is well settled Mississippi law that to modify child custody, a non custodial party must prove (1) there has been a substantial change in the circumstances affecting the child; (2) the change adversely affects the children's welfare; and (3) a change in custody is in the best interest of the child. *Bredemeier v. Jackson* , 689 So.2d 770, 775 (Miss. 1997); *Thompson v. Thompson* , 799 So.2d 919, 922 (Miss. Ct. App. 2001). In the present case, there was no hearing held, so in no way were the required showings made. The majority opinion quotes the Court of Appeals, stating that the chancellor made appropriate findings for why he was changing custody. The only findings made by the chancellor were in the previous hearing held in June, 1999, in conjunction with a request for modification of visitation, when the chancellor specifically stated "what I am granting is extended visitation. I am not touching custody now."

¶ 17. There is nothing in the record that supports that there was a hearing held on the merits concerning custody modification, thus Howard's right to a hearing were not honored. Additionally, there is every reason to believe that the "temporary" custody order was in actuality, as permanent as a modifiable custody order may be. Therefore, I respectfully dissent.

EASLEY AND DICKINSON, JJ., JOIN THIS OPINION.

1 Chancellor Griffin explained that the entry of a final order would end his appointment as special judge, thus it would be a temporary order, to become permanent in six months if no problems arose.

2 The federal suit was dismissed as frivolous. *McDonald v. Griffin* , 1:99CV226-D-D, 1999 WL 33537119 (N.D. Miss. Oct. 4, 1999), *aff'd,* 228 F.3d 409 (5th Cir. 2000) (table), *cert. den* ., 531 U.S. 1150, 121 S. Ct. 1093, 148 L. Ed. 2d 966 (2001).

3 This suit was dismissed two months later, but no hearing on custody was scheduled.

4 Prior to the chancellor stating that there would be no hearing, he granted D.H.S.'s petition to be excused from performing a home study, and ask that he be informed who would be doing the study and when. Howard offered that the study had already been completed, and that the person who performed

the study was in court ready to testify about it. The chancellor refused to hear any testimony.

5 The bench ruling of August 3, 1999, stated: "There will be no hearing today."

6 In an earlier hearing when the chancellor modified visitation, he admitted that he was doing so on a temporary basis so that he would not lose jurisdiction over the case, having been appointed as a special judge to serve until the conclusion of this case.

APPENDIX 12

McDonald v. McDonald, 850 So. 2d 1182 (Miss. App. 2002)
Rehearing Denied Dec. 17, 2002.

IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 1999-CP-00848-COA

CONSOLIDATED WITH

NO. 1999-CP-01259-COA &

NO. 1999-CP-01384-COA

HOWARD CLAYBORNE MCDONALD JR
Appellant
v.
ROSEMARY SHEFFIELD MCDONALD
Appellee

DATE OF TRIAL COURT JUDGMENT: 3/17/99
TRIAL JUDGE: HON WILLIAM L. GRIFFIN JR
COURT FROM WHICH APPEALED: LEE COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT: DAVID R SPARKS
HOWARD CLAYBORNE MCDONALD JR
(IN PROPRIA PERSONA)

ATTORNEY FOR APPELLEE: C. JACKSON WILLIAMS
NATURE OF THE CASE: CIVIL-DOMESTIC RELATIONS

APPENDIX 13

TRIAL COURT DISPOSITION: MODIFICATION OF ORIGINAL DIVORCE DECREE; APPELLANT FOUND IN CONTEMPT FOR WILFUL VIOLATION OF VISITATION RIGHTS; TEMPORARY ORDER TRANSFERRING CUSTODY OF TWO CHILDREN TO THE APPELLEE

DISPOSITION: AFFIRMED - 10/01/2002

BEFORE SOUTHWICK, P.J., LEE, AND MYERS, JJ.
SOUTHWICK, P.J., FOR THE COURT:

¶1. This is a suit for modification of earlier domestic relation orders. Three separate appeals have been consolidated. The former husband alleges that the appointed chancellor lacked jurisdiction to hear the case, that an agreed order that neither he nor his attorney had signed should not have been entered, that $1106 in court costs should not have been assessed, that he should not have been found in contempt of court, and that he was denied due process at the time of a custody proceeding. We find no error and affirm as to all issues.

FACTS

¶2. In April 1998, the Lee County Chancery Court entered a decree ending the marriage of Howard Clayborne McDonald and Rosemary McDonald. The chancellor granted the divorce to Mr. McDonald on the basis of his wife's adultery and cruel and inhuman treatment. The factual basis for adultery was that Mrs. McDonald was involved in a sexual relationship with another woman. Mr. McDonald was granted physical custody of the two youngest children, while Mrs. McDonald was granted physical custody of the oldest child, who exercised a preference to reside with her. Each

party was granted reasonable visitation. The decree prohibited visitation in the presence of anyone with which Mrs. McDonald was having a lesbian relationship.

¶3. Later in the same year, Mrs. McDonald filed for modification. She alleged that her former husband was violating the decree's provisions regarding visitation. She requested that the court designate a schedule and remove the provision prohibiting visitation in the presence of her lesbian partner. Due to the recusal of all three chancellors in Lee County, the Supreme Court appointed former chancellor William L. Griffin, Jr. to preside. Special Chancellor Griffin established a schedule giving Mrs. McDonald visitation on every second and fourth weekend. Chancellor Griffin stated that because the entry of a final order ends the appointment of a special judge, his order would initially be temporary, to turn permanent in six months provided no problems arose.

¶4. At the conclusion of this hearing Chancellor Griffin asked both parties whether they accepted the proposed visitation schedule. Mrs. McDonald was in agreement with the schedule. When Mr. McDonald was asked whether he accepted it, he responded that "[u]nder the terms that my attorney and you have explained it to me, I have no choice but to agree, Your Honor." The chancellor stated that within ten days this order was to be signed by all parties and he would enter it.

¶5. Mr. McDonald later refused to sign the order. Consequently Mrs. McDonald filed a "Motion for Entry of Agreed Order." A hearing was held on April 6, 1999. Mrs. McDonald also requested attorney fees incurred by her during the hearing. During this hearing, Mr. McDonald's attorney filed a motion to withdraw. The motions for fees and for counsel to withdraw were

granted. Mr. McDonald requested a continuance to obtain new counsel, but the chancellor refused. On April 14, the chancellor entered the order modifying the divorce decree without gaining the signature of Mr. McDonald or his counsel. One of the present appeals is from that order.

¶6. On June 25, 1999, another hearing took place. Mrs. McDonald, her counsel, and Mr. McDonald who appeared without counsel, were present. The same special chancellor presided. Various motions were heard. Included were two motions for contempt filed against Mr. McDonald for interference with his former wife's visitation. After testimony from several witnesses, the chancellor found Mr. McDonald to be in direct contempt of court. Mrs. McDonald was awarded $1,500 in attorney fees. The court ordered that Mrs. McDonald have extended visitation until August 3, 1999, at which time a hearing was to be conducted to determine visitation, child support and the future custody of the children. The chancellor found that Mr. McDonald would do everything in his power to thwart the court's visitation order; consequently, the chancellor ordered the bailiff and Mr. McDonald's mother to retrieve the children from day care to ensure that the court could monitor the exchange of the children. The Lee County Department of Human Services was ordered to perform a home study of both parents' home, with the purpose of establishing the "responsibility and suitability of any other adults living in either home." These rulings were reduced to an order dated July 14, 1999, and Mr. McDonald has appealed here from that order.

¶7. A week later, Mr. McDonald filed a complaint in United States District Court, naming Special Chancellor Griffin among others as defendants and claiming that

they had violated his civil rights. The federal suit was dismissed in October 1999 as being frivolous. *McDonald v. Griffin* , 1:99CV226-D-D (N.D. Miss. Oct. 4, 1999), *aff'd* , 228 F.3d 409 (5th Cir. 2000) (table), *cert. den* . 531 U.S. 1150 (2001).

¶8. After a hearing on August 3, 1999, the chancellor entered an order for temporary custody of the two minor children with their mother, ordered child support by Mr. McDonald, and set a visitation schedule. Mr. McDonald appealed from the August 11 order setting out those rulings.

¶9. All appeals have been consolidated and deflected to this Court.

DISCUSSION

I. Jurisdiction of Special Chancellor Griffin

¶ 10. Mr. McDonald asserts that Special Chancellor Griffin lacked authority. First, it is argued that Mississippi Constitution Section 165 gives the Governor sole authority to appoint a special judge after a recusal. Chancellor Griffin was appointed by then-Supreme Court Chief Justice Lenore Prather. By statute, which Mr. McDonald asserts is unconstitutional, the Chief Justice may appoint a special judge if the judges for that jurisdiction are "unwilling or unable to hear a case . . . ." Miss. Code Ann. § 9-1-105 (Supp. 2001).

¶11. When a statute's constitutionality is challenged, a party must give notice to the Attorney General. M.R.C.P. 24(d). It is reversible error for a court to declare a statute unconstitutional without the Rule 24 notice. *State v. Watkins* , 676 So. 2d 247, 250 (Miss. 1996). [(1)] No such notice was given. We reject Mr. McDonald's argument that since the Attorney General represented Special

Chancellor Griffin in the federal litigation, that this is sufficient notice. Explicit notice to the Attorney General of the existence of this litigation and the challenge to the statute's constitutionality is required.

¶12. The constitutional issue arises from this provision:

Whenever any judge of the Supreme Court or the judge or chancellor of any district in this state shall, for any reason, be unable or disqualified to preside at any term of court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the governor may commission another, or others, of law knowledge, to preside at such term or during such disability of disqualification in the place of the judge or judges so disqualified. Miss. Const. art. 6, § 165 (1890).

¶13. This provision does not state that it is the exclusive mechanism for selection of special judges. The provision itself first sets out another alternative, namely, that the parties agree on a member of the bar as a replacement. The Governor's authority is prefaced with the word "may," indicating that the executive has personal discretion or perhaps that the use of this procedure is optional as opposed to using some other feasible but unstated procedure. The statute allowing an appointment by the Chief Justice also provides that if the Governor makes an appointment under his authority, the Chief Justice's appointment becomes void. Miss. Code Ann. § 9-1-105 (4) (Supp. 2001). Thus the statute offers an explicitly subordinate alternative to the Governor's constitutional power of appointment. We note these uncertainties about whether section 165 declares an exclusive procedure in light of the presumption of the constitutional validity of a statute. *Board of Trustees of*

State Institutions of Higher Learning v. Ray , 809 So. 2d 627, 636 (Miss. 2002).

¶14. If the statute is constitutional, then the special chancellor could properly be appointed in this manner. Yet even were we to find that there were flaws in the procedure, the appointment was pursuant to law and made Griffin at least a *de facto* judge, whose orders are valid until the issue of authority is properly raised and determined:

Crocker defined a de facto officer as "'one who exercises the powers and discharges the functions of an office, being then in possession of the same under color of authority, but without actual right thereto.'" [*Crocker v. Sears, Roebuck & Co.* , 346 So.2d 921, 922 (Miss.1977)](quoting *Adams v. Mississippi State Bank* , 75 Miss. 701, 725, 23 So. 395, 398 (1897) . . .). We noted that, "[i]t is well settled in this state that acts of a de facto judge are valid, regardless of whether he was properly appointed or qualified or not . . . ." *Crocker* , 346 So.2d at 922-23 (quoting *Bird v. State* , 154 Miss. 493, 500, 122 So. 539, 540 (1929)).
Barton v. Barton , 726 So. 2d 163, 166 (Miss. 1998). Chancellor Griffin was validly presiding over this case under the color of his appointment by the Chief Justice.

¶15. Because the issue was not properly presented by giving notice to the Attorney General, and because we find that in all events the appointment made the special chancellor at least a *de facto* officer, we find no basis to doubt the authority that may be given in this manner.

¶16. It is also alleged that Griffin did not take the required oath. However, there is a filed stamped oath of office signed by Chancellor Griffin in the record.

¶17. The special chancellor had authority to act in this case.

II. Notice of Motion; Entry of Agreed Order Without a Party's Signature

¶ 18. Mr. McDonald asserts that the April 14, 1999 order was no longer an agreed order by the time it was entered because he refused to sign it. He further asserts that he was entitled to five days' notice of his own attorney's motion to withdraw; not having received it, he needed a continuance.

¶19. By court rule, a party is entitled to five days' notice before a hearing on a motion. M.R.C.P. 6 (d). It makes sense to apply this rule to require an attorney to give his own client notice of a motion to withdraw. Yet we find that the certificate of service on the motion is dated March 25, 1999, indicates mailed notice to Mr. McDonald, and the hearing did not occur until April 6. When mailed notice is used, three days is to be added to the necessary period for notice. M.R.C.P. 6 (e). This motion complied with the notice requirements.

¶20. As to the continuance to find another attorney, the grant or denial is within the discretion of the trial court. A denial for a continuance should only be overturned when "manifest injustice" has occurred. *Hatcher v. Fleeman* , 617 So. 2d 634, 639 (Miss. 1993). The special chancellor determined that since Mr. McDonald had about two weeks' notice of his counsel's request to withdraw, that he should have obtained another attorney within that period of time if he needed one. The court also stated that the hearing was for the "ministerial act of entry of what this Court finds to be an order to which both of the parties, in open court, on the record, on March the 17th, 1999, agreed." We find this to be a fair

characterization of the facts that are relevant for whether denying a continuance was an abuse of discretion. We find no such abuse.

¶21. Mr. McDonald also argues that the order entered April 14, 1999, that modified the original divorce decree was invalid because he did not sign the order. We agree that there must be consent for a consent decree. Such consent did not exist at the time that the written order was ready for signature; it did exist at the earlier date that the terms of the order were finalized. At the conclusion of the initial hearing held on March 17, 1999, the following took place.

Chancellor: Mr. McDonald, you've heard everything I've said, and do you understand everything that I've said.
Mr. McDonald: Yes, Your Honor.
Chancellor: Okay. Is this your agreement, and you agree to everything that we've come to?
Mr. McDonald: Under the terms that my attorney and you have explained it to me, I have no choice but to agree, Your Honor.
Chancellor: Well, whether or not you have a choice is between you and your lawyer, but are you satisfied with the services that Mr. Sparks has provided for you today.
Mr. McDonald: Yes, sir.

¶22. What is apparent is that Mr. McDonald agreed, if unenthusiastically, to the modifications that had been determined at this hearing. The hearing ended with the act of reducing that understanding to writing still to occur. Since Mr. McDonald subsequently refused to sign such an order, on April 6, 1999, a hearing was held on Mrs. McDonald's motion for entry of the order. Mr. McDonald represented to the court that he had not realized some of the terms to which he was indicating

agreement at the previous hearing, including the precise visitation frequency and dates.

¶23. The order entered on April 14, 1999, asserted that it represented the earlier agreement of the parties but was signed after Mr. McDonald withdrew his consent. The special chancellor entered the order because it was "consistent with the Court's comments and with the agreement announced by the parties in the hearing on March 17, 1999." We therefore interpret the order as based on the special chancellor's conclusion that Mr. McDonald, having intelligently agreed to the order at the earlier hearing, would remain bound.

¶24. The issue this raises is whether a party can through counsel first agree to a judgment and then, prior to the entry of the order reflecting that judgment, withdraw his consent. What caused the withdrawal of consent to become apparent here is that Mr. McDonald's signature on the order was sought. Had the special chancellor himself prepared the order and entered it without seeking the parties' signature, so long as it properly reflected the agreement stated in open court, Mr. McDonald would have been limited to making an argument under Rule 60(b) that mutual mistake, fraud, or some other adequate ground permitted the modification of the order. M.R.C.P. 60; *Dunn v. BL Development Corp* ., 747 So. 2d 284, 285 (Miss. Ct. App. 1999). Should these sorts of limitations on challenging the order apply even prior to its formal entry?

¶25. A consent judgment is in the nature of a contract. *Parker v. Parker* , 434 So. 2d 1361, 1362 (Miss. 1982); *Guthrie v. Guthrie* , 233 Miss. 550, 553, 102 So.2d 381, 383 (1958). Here, a settlement was announced in open court and all that remained was to reduce its orally stated

terms to writing for judicial signature. We consider that question under traditional contract rules:

Whether contracting parties are bound by an informal agreement prior to the execution of a contemplated formal writing is a matter of intention to be determined by the surrounding facts and circumstances of each particular case.
WRH Properties, Inc. v. Estate of Johnson **, 759 So. 2d 394, 397 (Miss. 2000), quoting** ***Mid-Continent Tel. Corp. v. Home Tel. Co.*** **, 319 F.Supp. 1176, 1189 (N.D. Miss. 1970). We find that the circumstances of announcing in open court the settlement of the dispute that is the purpose for that hearing, with a recital of the terms of the settlement into the record, followed by an agreement to end the hearing, reflects an intention to be bound at that time.**

¶26. Absent any showing that the final written order did not reflect the agreement announced in court, or any identification of a matter cognizable under Rule 60 that could lead to setting aside a consent decree after being entered -- and neither showing exists here -- we find that the parties were bound by their agreement even before it was reduced to a formal written order.

III. The Cost of Appeal.

¶ 27. Mr. McDonald maintains that the wrong statute was used to determine the costs that he was to pay for the appeal. Appellee, perhaps unconcerned about the clerk's finances, does not address the issue. We thus examine the claim without the benefit of a response.

¶28. Mr. McDonald makes two specific claims. First is that the chancery clerk charged two dollars a page for the transcript and record, when the statute that the clerk referenced is actually for circuit clerks. The point has initial plausibility. The supplemental cost bill submitted by the clerk sought the following:

APPENDIX 23

Clerk's file 140 pages @ $2.00 per page $280.00
Exhibits 370 pages @ $2.00 per page $740.00

¶29. The clerk informed McDonald that the "fees are calculated per Section 25-7-13 (6) . . . ." What gives McDonald's claim plausibility is that section 25-7-13 is entitled "Fees for Circuit Clerks," while section 25-7-9 is the one entitled "Fees for Chancery Clerks." However, the specific section of the circuit clerk statute that the chancery clerk referenced stated this:

(6) For making final records required by law, including, but not limited to, circuit and county court minutes, and furnishing transcripts of records, the circuit clerk shall charge Two Dollars ($2.00) per page. *The same fees shall be allowed to all officers for making and certifying copies of records or papers which they are authorized to copy and certify.*

Miss. Code Ann. § 25-7-13 (6) (Supp. 2001) (emphasis added). It is difficult to imagine what might be meant by "all officers" unless it is those public officials in addition to circuit clerks whose records may need to be copied and certified. Indeed, it makes little sense for a circuit clerk to get one fee for copies of records generated in that court and a clerk performing the identical function for another court receive a different fee. We find no corresponding provision in the chancery clerk statute that sets a fee for making copies of records for appeal. There is a chancery clerk provision statute for certifying copies of filed documents. Miss. Code Ann. § 25-7-9 (1) (a) (Rev. 1999). That would appear to apply to such certifications as might be needed if someone wanted a copy of a filed deed or will. Another section permits a 50 cents per page fee for making a copy of any filed document. Miss. Code Ann. § 25-7-9 (1)(e) (Rev. 1999). That would be the charge whenever a chancery clerk is making an

uncertified copy of a recorded document to give to a member of the public.

¶30. The relationship between these statutes on chancery and circuit clerk fees can be better understood by a review of the initial enactment from which both statutes are derived. In 1928, the Mississippi legislature adopted a comprehensive "Act fixing [the compensation for sheriffs;]. . . the fees, salaries, and compensation of the chancery clerks, the county auditor, and clerks of the boards of supervisors; and the fees, salaries and compensation of the clerks of the circuit courts . . . ." 1928 Miss. Laws ch. 87 caption. Section 1 of the 1928 Act contained multiple paragraphs setting fees and other compensation for sheriffs. A caption appeared immediately before the entire section, stating "Sheriffs: compensation." Later paragraphs of Section 1 also had captions, such as "Fees," "Sheriffs: additional fees," and "Sheriff's fees in criminal cases in which the state fails." Similarly, Section 2 which provided lengthy compensation and fee rules for chancery clerks, had the initial heading "Chancery clerks: compensation." Subsequent paragraphs of Section 2 had headings such as "Filing and recording fees allowed," and "Fees for attending court." The first heading for Section 3 was "Circuit clerks: compensation." Later paragraphs had headings as well. The last paragraph in Section 3, all of which until then specifically referred in the heading or text to circuit clerks, was entitled "All officers: certification fees allowed." It is there that the predecessor language to section 25-7-13 (6) was first enacted. Though the rate of compensation has changed (in the pre-photocopy technology version, the charge was by the word), the relevant language is otherwise identical. It closed by saying "and the same fees shall be allowed to all officers for making and certifying copies of records or

papers which they are authorized to copy and certify." 1928 Miss. Laws ch. 87, at 119. The purpose is evident. The Act set the fees and compensation for a variety of offices, usually did so in specific sections for specific officials, but in the paragraph relevant for us dealt collectively with all officers making official transcripts.

¶31. The only specific statute relating to making copies of final records and transcripts may be in a statute generally related to circuit clerks, but it specifically provides that all other officers may charge the same. Therefore, section 25-7-13 (6) is the appropriate statute for the chancery clerk.

¶32. We note that the chancery clerk on October 13, 1999, sent an estimate of costs to Mr. McDonald, asserted that $2.00 per page under the statute just named was the correct charge, but informed him that a charge of $1.00 per page that had earlier been quoted to Mr. McDonald would be honored. For whatever reason, on March 27, 2001, the chancery clerk sent a notice to the Clerk of the Supreme Court and Court of Appeals that the amount tendered by Mr. McDonald was unsatisfactory and that an additional deposit -- based on $2.00 per page -- would need to be paid. M.R.A.P. 11(b)(2) (supplemental request may be made by clerk and ruled on by trial judge). It is this extra charge that is challenged by Mr. McDonald.

¶33. Mr. McDonald initially deposited $150.00. When the chancery clerk in October 1999 informed him that he would honor the $1.00 per page charge, the amount necessary for costs would have been $701.00, less the $150.00 already paid. Apparently, the extra amount was not paid because in 2001 when the $2.00 per page charge was submitted, the chancery clerk indicated that only

$150.00 had been received. On May 18, 2001, the special chancellor granted the clerk's request.

¶34. We consider the chancery clerk's October 1999 statement that it would honor the $1.00 per page charge to have been an offer. Had Mr. McDonald paid the lower amount at that time, we have serious question of whether the clerk later could increase the estimate of costs based on the higher per page charge and thereby require an additional payment. However, since Mr. McDonald allowed 17 months to pass without paying anything more than his personal estimate of $150.00 for the appeal, we do not find an abuse of discretion in the trial court's decision to require Mr. McDonald to pay the statutorily required amount.

¶35. The other claim by Mr. McDonald is that the chancery clerk has not posted his fees in a conspicuous place as required by law. Miss. Code Ann. § 11-53-79 (1972). According to that statute, the clerk is not entitled to receive a fee for "any service rendered during the time of such failure" to post the fee schedule. *Id.* However, Mr. McDonald does not point us to any part of the record in which evidence appears of a failure to comply with this statute. There is a letter in the record that Mr. McDonald sent to the chancery clerk, asserting that his "latest visit to your office reveals you have not complied with this mandatory legislative code." A party's assertion in an unsworn letter does not prove the existence of any stated fact. Having failed to present evidence of such a failure to post a schedule, Mr. McDonald cannot avoid the payment of the fees.

IV. Contempt Hearing

¶ 36. Mr. McDonald was found in contempt on two counts of the court's order that had been entered on April 14, 1999. A finding of contempt is proper when one

party has "willfully and deliberately" disobeyed an order of the court. *Bredemeier v. Jackson* , 689 So. 2d 770, 777 (Miss. 1997). Contempt matters are committed to the sound discretion of the trial court and their resolution will not be disturbed absent a showing that a finding of contempt was not based on substantial credible evidence. *Caldwell v. Caldwell* , 579 So. 2d 543, 545 (Miss. 1991).

¶37. The first contempt motion, which was filed on May 7, 1999, alleged that Mr. McDonald unreasonably interfered with Mrs. McDonald's visitation rights. The second contempt motion was filed on June 9, 1999. It dealt with Mr. McDonald's refusal to cooperate with his ex-wife in establishing dates for the extended visitation as required by the April 14, 1999 court order. The chancellor found Mr. McDonald in direct contempt for each charge. Mr. McDonald argues that the lower court committed error by denying him the right to have a jury trial.

¶38. Generally there is no right to a jury trial in chancery court. The constitutional right to a jury trial would arise if Mr. McDonald was to be tried on a serious criminal charge. *Walls v. Spell* , 722 So. 2d 566, 572 (Miss. 1998). If the offense has a maximum sentence of no more than six months incarceration, that is generally considered a petty crime. *Blanton v. City of North Las Vegas* , 489 U.S. 538, 543 (1989). Since the sentence for criminal contempt in Mississippi has no statutory limit, "we look to the penalty actually imposed as best evidence of the seriousness of the offense." *Walls* , 722 So. 2d at 572. Here, no sentence was imposed. Mr. McDonald was required to pay $1500 attorneys fees and court costs. We do not find that a substantial enough penalty as to be the equivalent of a sentence for which a jury trial is necessary.

¶39. This finding of contempt was only civil and not criminal if it was a mechanism to acquire obedience to an order of the court. *Common Cause of Mississippi v. Smith* , 548 So. 2d 412, 415 (Miss. 1989). For example, incarcerating someone only until the detainee agrees to abide by a court order would be civil contempt. Criminal contempt is punishment for past misbehavior; civil contempt is encouragement for future proper behavior. Since Mr. McDonald was not incarcerated at all, it is difficult to categorize this finding. Regardless, no jury trial was needed.

¶40. The record is replete with instances in which Mr. McDonald's behavior was deliberate. The chancellor's decision to hold Mr. McDonald in direct contempt of the April 14 order is supported by substantial evidence. The chancellor determined that Mr. McDonald intended to refuse to comply with the modification of the divorce decree and would make a mockery of the legal system in doing so. The evidence was sufficient for a finding of contempt. Awarding costs and attorneys fees because a contemptuous party has necessitated the holding of a hearing to enforce a prior order of the court is appropriate. *Mount v. Mount* , 624 So. 2d 1001, 1005 (Miss. 1993). That was the only significant effect of the finding of contempt.

¶41. Mr. McDonald again challenges this chancellor's authority for ruling at all. He alleges that the chancellor's power was extinguished upon the appeal of the April 14, 1999 order. An appeal without a supersedeas bond does not stay an order of the court; violation of the appealed order subjects a party to contempt proceedings. *Vockroth v. Vockroth* , So. 2d 459, 463 (Miss. 1967).

APPENDIX 29

¶42. Mr. McDonald asserts that Special Chancellor Griffin did not have jurisdiction to preside over the contempt proceedings. "We have held that the duration of a special judge's appointment will be determined by the order of appointment." *Barton v. Barton,* 726 So. 2d 163, 166 (Miss. 1998). The appointment order filed on January 11, 1999, authorized Special Judge William L. Griffin to "preside and conduct proceedings in the above referenced case pursuant to and by the authority of Miss. Code Ann. Section 9-1-105." That statute, which provides for appointment of special chancellors, also provides that the appointment order "shall describe as specifically as possible the duration of the appointment." Miss. Code Ann. § 9-1-105 (8) (Supp. 2001). Though the specificity is limited, it would appear that the special chancellor's authority continues until the proceedings are concluded. The mere appeal of an order during ongoing proceedings did not extinguish the appointment. Matters of custody and failure to comply with visitation remained open, and as indicated below, several months later a temporary change in custody was ordered.

¶43. Mr. McDonald also asserts that the special judge was personally involved and biased, thereby preventing McDonald from receiving a fair trial on contempt. We find no evidence in the record of such bias. "A presumption of impartiality exists that a judge, sworn to administer impartial justice, is qualified and unbiased. To overcome the presumption, the evidence must produce a 'reasonable doubt.'" *Wal-Mart Stores, Inc. v. Frierson* , 818 So. 2d 1135,1141(Miss. 2002). We find that Mr. McDonald has produced nothing more than mere allegations.

APPENDIX 30

V. Temporary Order Entered August 11, 1999.

¶ 44. Mr. McDonald's final assertion of error deals with the procedure underlying an order for a temporary change in custody of the two youngest children to their mother, entered on August 11, 1999. That order also granted Mr. McDonald visitation during the period of the temporary order, and required that he pay child support.

¶45. We find no procedural irregularity in the hearing on the temporary order. The chancellor had announced at the end of a prior hearing on June 25, 1999, that he wanted after a home study had been conducted regarding both parents, to have a hearing on custody and other matters. After some delays, that hearing led to the order that is challenged. The special chancellor made appropriate findings for why he was temporarily changing custody, including Mr. McDonald's continuing interference with his former wife's visitation with the children who were in his custody.

¶46. What is not here for our review are any rulings since the temporary order. The order invited further motions to address custody and support issues. The impediment of the then-pending federal suit against the special chancellor has been removed. We find nothing to review about this explicitly temporary order entered three years ago. *Michael v. Michael* , 650 So. 2d 469, 471 (Miss. 1995) (appellate review of temporary orders is improper).

¶ 47. THE JUDGMENTS OF THE CHANCERY COURT OF LEE COUNTY AWARDING AN ADDITIONAL $1,106 IN NECESSARY COSTS FOR APPEAL, FINDING HOWARD CLAYBORNE MCDONALD, JR. TO BE IN CONTEMPT, AND MODIFYING THE FINAL DIVORCE DECREE ARE

AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

McMILLIN, C.J., KING, P.J., BRIDGES, THOMAS, LEE, MYERS, CHANDLER AND BRANTLEY, JJ., CONCUR. IRVING, J., CONCURS IN RESULT ONLY.

1. The Supreme Court's official comment to the Rule provides that failure to give the notice "does not deprive the court of jurisdiction to decide the case." M.RC.P. 24 cmt. How that should be interpreted in light of *State v. Watkins* , which is cited in the comment, is unclear.

APPENDIX 32

IN THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI

ROSEMARY SHEFFIELD MCDONALD

PLAINTIFF

Vs **ACTION NO. 95-0437**

HOWARD CLAYBORNE MCDONALD, JR

DEFENDANT

ORDER

On June 25, 1999, the parties brought before the Court several motions, each of which is identified in the body of this Order. The Court read all legal arguments raised by the parties in their respective written motions and responses, and weighed all evidence offered in support thereof. At the hearing on the motions, the Court permitted the parties to offer new legal arguments and new evidence in support of their motions and responses. Having carefully considered the legal arguments and the evidence offered by the parties, the Court addresses the motions brought before it for hearing on June 25, 1999, in the following manner:

PROCEDURAL MOTIONS

Howard Clayborne McDonald's Ore Tenus Motion for a Stay of the Hearing. The motion is not well taken, and is denied.

APPENDIX 33

Petition for Recusal of William L Griffin Jr. This petition was submitted by Howard Clayborne McDonald Jr. In support of his petition, Mr McDonald offered authorities correctly stating that under Mississippi law, a judge must disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality. Being intimately familiar with all circumstances surrounding his relationship to parties and his interest in the action, the Court finds that the petition for recusal is not well taken and that it should be denied.

Petition to Quash Subpoena. This petition was submitted by Howard Clayborne McDonald Jr in regards to the subpoena served upon him on behalf of Rosemary McDonald. The Court finds the motion to be moot.

Petition to Quash Subpoena. This petition was submitted by David Sparks, formerly counsel to Howard Clayborne McDonald Jr to quash for inconvenience a subpoena served upon him on behalf of Rosemary McDonald. The parties announced in open court that they had agreed to supplement the record with Mr Sparks deposition should it be required. Accordingly, the Court found the motion to quash should be and was amended so as to seek permission to supplement the record with Mr Sparks deposition transcript, that the amended motion for supplementation of the record with the deposition of David Sparks should be granted and that Rosemary McDonald would be permitted to depose Mr Sparks and to submit the deposition transcript to the Court should she so desire. Subsequent to argument on the motion and the Courts ruling thereon, counsel for Rosemary McDonald announced that because Exhibit 5 to the hearing had been admitted into evidence without

objection, there was no need for further testimony of Mr Sparks. Accordingly, the Court finds the motion to be moot.

Respondent's Motion for Summary Judgment Dismissing Rosemary McDonald's Motion to Hold Clay McDonald in Contempt for Unreasonably Interfering With Her Visitation Rights, served by Howard Clayborne McDonald Jr on May 7, 1999. The Court finds that the motion is not well taken, it is denied.

Howard Clayborne McDonald Jr's Petition for Summary Judgment Dismissing Rosemary McDonald's Second Motion to Hold Clay McDonald in Contempt for Unreasonably Interfering With Her Visitation Rights and Howard Clayborne McDonald Jr's Petition for Summary Judgment Dismissing Rosemary McDonald's Motion to Hold Clay McDonald in Contempt of Court for Unreasonably Interfering With Her Visitation Rights, filed June 9, 1999. The Court finds that both motions are not well taken, they are denied. Included in the combined motions is a demand for a jury trial and a prayer to sanction C. Jackson Williams pursuant to Rule 4 of the Rules of Discipline of the Mississippi State Bar. The Court finds the demand and the prayer are not well taken; they are denied.

Petition to Dismiss on the Pleadings Pursuant to MRCP 12 (b), filed by Howard Clayborne Donald, Jr. The Court finds that this motion is not well taken; it is denied.

APPENDIX 35

SUBSTANTIVE MOTIONS
Findings of Contempt

Rosemary McDonald's Motion to Hold Clay McDonald in Contempt for Unreasonably Interfering with Her Visitation Rights. The Court finds that notwithstanding Clay McDonald's expressed concern about the identity and the responsibility of the people picking up his children, he far exceeded any reasonable guidelines in addressing these express concerns, and that this is the product of an ongoing conflict between him and Rosemary McDonald's lifestyle and partner. The Court finds that Howard Clayborne McDonald Jr has unreasonably interfered with Rosemary McDonalds visitation rights in contempt of paragraphs II.A. and II.H. of the Agreed Modification of Final Divorce Decree (and the clerical correction thereto).

Rosemary McDonald's Second Motion to Hold Clay McDonald in Contempt for Unreasonably Interfering With Her Visitation Rights. Paragraph II.F. of the Agreed Modification of Final Divorce Decree (and the clerical correction thereto) granted to Rosemary McDonald two to three weeks of vacation with her two youngest daughters, Carie and Leah. The Court finds that Howard Clayborne McDonald Jr intends to do everything in his power to thwart the order of the Court that Rosemary McDonald be permitted such vacation visitation under the guise of "pursuing his legal remedies" and that Howard Clayborne McDonald Jr has unreasonably interfered with Rosemary McDonalds visitation rights in contempt of paragraph II.F. and II.H. of the Agreed Modification of Final Divorce Decree (and the clerical correction thereto). The Court also finds that Howard Clayborne McDonald Jr's defense of unclean

hands is not well taken for the reason that Rosemary McDonald complied with the mandate of paragraph VI of the Agreed Modification of Final Divorce Decree (and the clerical correction thereto), as evidence by Exhibit 5 introduced into evidence during the hearing on these matters. The Court finds that Rosemary McDonald entered the Court with clean hands.

Further Findings Flowing from Hearing on the Contempt Motions

The Court also finds that it is important for Leah McDonald and Carie McDonald to spend quality time with Rosemary McDonald, that they have not been permitted to do this for a considerable period of time, and that they should be permitted extended visitation with Rosemary McDonald from June 25, 1999, through August 3, 1999. The Court finds that the best interest of the children be served by the Lee County Department of Human Services performing a home health study of the homes of the respective parties, with a study of and report to the Court as to the responsibility and suitability of any other adults living in either home. The Court finds that it is in the best interests of the children to not be placed in the middle of disputes between the parties, including disputes arising during the exercise of visitation rights, and that it is in the best interests of the children for the parties to acquire the communication and coping skills necessary to speak directly with one another concerning the logistics of visitation and all things affecting the welfare of their children. The Court finds that it is in the best interests of the children to not be in the presence of anyone consuming alcohol or illegal drugs. The Court notes that many controversies might have been avoided if Rosemary McDonald had a partner

other than Nancy Evans. The Court finds that Clay McDonald conveniently remembered facts when it suited his interests, conveniently forgot them when that suited his interests, and that in general his testimony was not credible. The Court finds that Carie McDonald (a three year old child) is old enough to go wherever Rosemary McDonald, her mother, wishes her to go, and that Rosemary McDonald may take her children to St Louis or any other reasonable place, on vacation. The Court finds that Howard Clayborne McDonald should be entitled to reasonable visitation during the period of Rosemary McDonald's extended visitation. The Court finds that Rosemary McDonald is entitled to reasonable attorney's fees in the amount of $1500.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED:

I. **Temporary Order – This is a temporary order. Special Chancellor William Griffin retains jurisdiction over the parties and this matter until such time as a final order is entered in this cause. The status of this Order will be taken up at the status conference scheduled in this action on August 3, 1999.**

II. **Status Hearing – A status hearing will be conducted in a courtroom of the Lee County Chancery Court on August 3, 1999, at 2:00 p.m. to review all that has occurred in this matter in the interim. The Department of Health and Human Services will report the results of its home study at the time. The Court will, at the minimum, hear any and all motions to the future custody of the children at that time. The Court may conduct a trial on the issue of custody at that time.**

III. Department of Health and Human Services – The Lee County Department of Health and Human Services shall conduct a home study of Howard Clayborne McDonald Jr's home and of Rosemary McDonald's home. The study shall include evaluation of the responsibility and suitability of any other adult living in either home.

IV. Rosemary McDonald will have extended visitation with Leah McDonald and Carie McDonald from June 25, 1999 until and including August 3, 1999. She can take the children on extended vacation to St Louis, Missouri, or any other reasonable place during this period; in the event the children must sleep in the same motel room with Rosemary McDonald, she shall not sleep in the same bed with Nancy Evans in the presence of the children. A general itinerary should be provided for Mr. McDonald if a vacation will be out of town.

V. Howard Clayborne McDonald Jr's Mirror Visitation Rights – During the period commencing June 25, 1999 and ending August 3, 1999, Howard Clayborne McDonald may visit with Leah and Carie pursuant to the following schedule and terms:

A. WEEKENDS: Second and fourth weekends of every month from Friday at 6:00 P.M. until Sunday at 6:00 P.M.

B. WAITING: The children and the custodial parent have no duty to await the visiting parent for more than 30 minutes of the visitation time. A parent who is late forfeits companionship for that period.

C. CANCELLATIONS: If a child is ill, the custodial parent should give 24-hour notice, if possible, so appropriate plans can

D. be made. The non-custodial parent should give 24-hour notice to cancel. The time canceled by the non-custodial parent is forfeited.

E. PICKUP AND DELIVERY – The non-custodial parent may designate a responsible person to pick-up and deliver the child from the custodial parent. The parties agree that Heather McDonald is a responsible person.

F. INTERFERENCE – Neither party shall interfere with the visitation rights of the other.

VI. Telephone – Each parent has the right to make two phone calls per week to children in the custody of the other parent during the hours of 6:00 p.m. until 9:00 p.m. This right may be exercised Monday through Thursday of any week.

VII. Other Acts in Best Interests of the Children – Each party shall not allow others to use profane language in the presence of the children. Each party shall not and shall not allow others to berate the other party in the presence of the children. The parties shall do everything in their power to foster a kind and loving relationship between the children and both parents. The parties shall do everything in their power to reestablish a close and loving relationship between the children. Neither party shall consume or permit anyone else to consume alcohol or illegal drugs in the presence of the children.

VIII. Coordination With Prior Decrees and Orders – To the extent that this Order conflicts with any order or decree previously entered in this civil action, the provisions of this Order control; otherwise, the terms of

orders and decrees entered previously in this action are given the same effect as they had on June 24, 1999.

IX. Entry of Order – C. Jackson Williams, counsel for Rosemary McDonald, shall submit a proposed order to Clay McDonald for his consideration on or before July 2, 1999. Clay McDonald will have the Order, executed by the parties, returned to C. Jackson Williams or forwarded to the Honorable William L Griffin Jr, Special Chancellor, on or before July 9, 1999. If the order is not returned to Special Chancellor Griffin by that time, he will enter the order as submitted by C. Jackson Williams.
X. Attorney's Fees and Costs – Howard Clayborne McDonald Jr shall pay to Rosemary McDonald attorney's fees in the amount of $1500 on or before thirty days following entry of this order. Mr McDonald shall pay all court costs to include court reporter transcription costs, within 10 days of entry of this order.
SO ORDERED, ADJUDGED AND DECREED, this the 14 day of July, 1999.
/s/ William L Griffin Jr
SPECIAL CHANCELLOR

Submitted by C. Jackson Williams; served by facsimile and first class mail, postage prepaid, to Clay McDonald on 7 July, 1999 at his usual facsimile number and residential address.

Approval Signatures Not Required by the Court for Good Cause Shown. /s/ WILLIAM L GRIFFIN JR

APPENDIX 41

IN THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI

ROSEMARY SHEFFIELD MCDONALD

Vs. **NO. 95-0437**

HOWARD CALYBORNE MCDONALD JR

BENCH RULING

On the Court's own Motion, the Court makes the following Bench Ruling:

William L. Griffin Jr was appointed as Special Judge in this Cause by Order of the Mississippi Supreme Court dated January 11, 1999.

This Court held a hearing in this Cause on June 25, 1999, and ordered, inter alia, that Rosemary McDonald would have temporary custody of Leah and Carie for extended summer visitation. This temporary custody was to be reviewed at a hearing scheduled for today, August 3, 1999. It was the intent of the Court to review today all issues with regard to the custody of these children, child support, and visitation and to enter an Order addressing those and any other issues which might be before the Court.

To aid the Court, the Court heretofore requested that the Department of Human Services conduct an investigation of the homes of the parties. Neither a report nor testimony from DHS as to the suitability of

the parties' respective homes is available to the Court today.

On July 20, 1999, a VERIFIED COMPLAINT was filed in the United States District Court for the Northern District of Mississippi (Civil Action No. 1:99CV226-D-D) by Howard Clayborne McDonald Jr naming, among others, William L. Griffin Jr, the judge in this Cause, as a Defendant in said action. This Court is of the opinion that, pending a resolution of the United States District Court action with regard to William L Griffin Jr, all matters now pending before the Court in this Cause should be held in abeyance.

It is the Ruling of this Court that, out of an abundance of caution, and pending a resolution with regard to William L Griffin Jr of that United Court District Court action heretofore filed by Howard Clayborne McDonald Jr, all matters now pending before the Court in this Cause will be held in abeyance. There will be no hearing today.

However, there are two children before the Court whose future custody and support must be at least be temporarily addressed pending the resolution of the United States District Court Action. The Court, therefore, makes the following temporary Ruling with regard to child support, visitation, and the custody of those minor children.

Until further Order of this Court, the temporary custody of Leah and Carie McDonald, two of the minor children of the parties, is granted to Rosemary McDonald, who already has the permanent custody of Heather, the third child of the parties, by prior Order of this Court. Mr.

McDonald shall have those specific visitation privileges heretofore awarded to Rosemary McDonald.

The Court, upon receipt of the DHS report and upon the motion of either party, may schedule a hearing for the limited purpose of addressing any custody issues which might be raised by the DHS report and which are contrary to today's Temporary Order. If the DHS report and its recommendations are consistent with today's Temporary Order, then no hearing will be scheduled.

As to child support, Mr. McDonald has exhibited more than a passing familiarity with the various rules applicable to Chancery Court proceedings. The Court takes judicial notice of the fact that Mr. McDonald has failed to comply with Chancery Court Rule 8.05. Therefore, the Court has no evidence before it today upon which to base a child support award and must use its best judgment in this regard.

The Court will set Mr. McDonald's monthly child support obligation at $600 per month. The child support will be paid in two installments of $300 each, one on the first day of each month and one on the fifteenth day of each month. The first payment shall be made on August 15, 1999, and a like payment shall be made on the first and fifteenth of each month until further order of the Court. This is for the three children born of the marriage of the parties. The Court is of the opinion that, absent proof to the contrary, this is a minimum amount of child support for three children.

In fairness, particularly to Mr McDonald, the Court may, upon motion of either party and after Mr McDonald's full compliance with Chancery Rule 8.05, schedule a

hearing for the limited purpose of addressing the issue of child support. Unless and until an Order is entered, modifying the award made today, the $600 per month child support shall be paid as ordered.

Mrs McDonald and her attorney prepared for a hearing today. The fact that there is not going to be a hearing is a direct result of the actions of Mr McDonald. Therefore, equity requires and the Court orders that Mr McDonald pay to Rosemary McDonald the sum of $750 in attorney fees for this proceeding. This shall be paid by August 13, 1999.

This Court expressly retains jurisdiction to address those custody and child support issues referred to above as well as any and all emergency and/or exigent matters which might arise in this case pending a resolution of the United States District Court action with regard to William L. Griffin, Jr.

Mr. Williams will prepare and submit to the Court for signature and entry as an Order consistent with this Ruling, setting out therein the specific visitation privileges of Mr. McDonald. There will be attached to that Order a Copy of this Bench Ruling. No approvals will be required on that Order.

Pending the entry of the formal Order, this Bench Ruling shall be the Order of the Court and shall be enforceable as if it were in formal Order form.

ORDERED, this the 3rd day of August, 1999.

/s/ WILLIAM L GRIFFIN JR
Special Chancery Judge

APPENDIX 45

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

HOWARD C MCDONALD JR **PLAINTIFF**

Vs **No 1-99cv226-D-D**

WILLIAM L GRIFFIN JR, et al **DEFENDANTS**

OPINION

Presently before the Court are separate motions of the defendants for dismissal pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure. Upon due consideration of the motions, the court finds that they should be granted.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff in this case is an irate former husband bringing an attempted civil rights action arising from his state child custody case. In his pro se complaint he seeks a total of $144 million in damages from among others his ex-wife, her lawyers, the ACLU and the Chancellor who presided over the case. This case is reminiscent of Hale v Harney, 786 F 2d 688 (5th Cir 1986) and Brinkmann v Johnston, 793 F 2d 111 (5th Cir 1986) and, likewise, is a frivolous and misguided attempt to harass the defendants with groundless litigation.

APPENDIX 46

DISCUSSION

A. Motion to Dismiss

The plaintiffs complaint, since he is appearing pro se, is to be construed liberally. Kremp v Dobbs, 775 F 2d 1319, 1320 (5th Cir 1985) Additionally, in ruling on a motion to dismiss under Rule 12 (b)(6), the court must take as true the well-pleaded allegations in the complaint and construe them in the light most favorable to the plaintiff. C.C. Port, Ltd v Davis-Penn Mtg Co 61 F 3d 288, 289 (5th Cir 1995). Dismissal is only proper if it appears certain that the plaintiff cannot prove any set of facts that would entitle him to the relief he seeks. C.C. Port Ltd 61 F.3d at 289. Moreover, if a required element or a prerequisite relief is lacking in the complaint, dismissal is proper. ID.

B. Judicial Immunity

The plaintiffs civil rights suit against the state judge is frivolous. At all times, Judge Griffin was acting within the scope of his judicial duties, the complaint contains no credible allegations to the contrary. This being the case, Judge Griffin is absolutely immune from suit. Stump v Sparkman, 435 US 349, 362-64, 98 S.Ct 1099, 1107-09, 55 L.Ed 2d 331 (1978). It is well settled that a judge enjoys absolute immunity from liability for any damages resulting from judicial acts performed within his jurisdiction. Brinkman 793 F 2d at 112. Therefore, the plaintiffs claims against Judge Griffin are dismissed.

C. 42USC 1983 and the Rooker-Feldman Doctrine

The plaintiffs claims against the remaining defendants are likewise frivolous. Although private acts may support an action for liability under 42 USC 1983 if the defendant is a "willing participant in a joint action with the state or its agents," the plaintiff must state specific facts, not merely conclusory allegations, supporting his charge. Brinkmann 793 F 2d at 113; Hale 786 F 2d at 690. The plaintiff's complaint in the present case does not state any factual basis to support his conspiracy charges. Therefore, dismissal on this ground alone is proper.

Moreover, it has long been settled that litigants may not obtain review of state court actions by filing complaints about those actions in a lower federal court. Brinkmann 793 F 2d at 113. This principle, known as the Rooker-Feldman doctrine, is not limited to actions which candidly seek review of the state court's actions but extends to all cases in which the constitutional claims presented in federal court are "inextricably intertwined" with the state courts action. Id The plaintiff's suit here solely concerns actions taken during his state custody litigation. Therefore, the claims he has presented in this court are inextricably intertwined with the state courts action in that litigation and Rooker-Feldman applies with full force rendering dismissal of the complaint appropriate.

D. Sanctions

The Fifth Circuit long ago cautioned pro se litigants that attempts to appeal state court domestic proceedings to federal court under the guise of civil

rights actions invites sanctions. Brinkmann 793 F 2d at 113. This plaintiff is proceeding pro se (despite his protestations to the contrary) and is presumed to be cognizant of the Fifth Circuit's warning. While sanctions are appropriate in this case, the court declines to impose them. Instead, the plaintiff is hereby warned that any future frivolous litigation will result in the imposition of substantial monetary and nonmonetary sanctions.

A separate order in accordance with this opinion shall issue this day.

This the 4th day of October 1999.

— s —
Glenn H Davidson

United States District Judge

Filed Oct 5 1999

APPENDIX 49

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

HOWARD C MCDONALD JR PLAINTIFF

Vs No 1-99cv226-D-D

WILLIAM L GRIFFIN JR, et al DEFENDANTS

OPINION

Presently before the court is the Plaintiff's "Petition for Reconsideration of Order Dismissing Complaint" After careful consideration of the petition, the court finds that it should be denied.

THEREFORE, it is hereby ORDERED that the Plaintiff's petition for reconsideration is DENIED.

SO ORDERED, this the 21st day of October 1999.

— s —
Glenn H Davidson

United States District Judge

Filed Oct 21 1999

APPENDIX 50

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO 99-60783
SUMMARY CALENDAR

HOWARD C MCDONALD JR
PLAINTIFF-APPELLANT

Versus

WILLIAM L GRIFFIN JR; JOHN DOE INSURANCE; AMERICAN CIVIL LIBERTIES UNION, INC; JOHN DOE INSURANCE; LESLIE J COOPER; DUNBAR WILLIAMS, PLLC; JOHN DOE INSURANCE; C. JACKSON WILLIAMS; ROSEMARY S MCDONALD; NANCY R EVANS
DEFENDANTS-APPELLEES

Appeal from the United States District Court
For the Northern District of Mississippi
USDC No 1:99-cv-226-D-D

Before POLITZ, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

PER CURIAM*

***Pursuant to 5th Cir R 47.5, the court has determined that this opinion should not be published and is not precedent excepts under the limited circumstances set forth in 5th Cir R 47.5.4.**

APPENDIX 51

Howard C McDonald Jr appeals the dismissal of his 42 USC 1983 civil rights complaint under Fed R Civ P 12 (b)(6), based on the trial court's determination that McDonald failed to state a claim upon which relief may be granted. McDonald's complaint alleged that his ex-wife, Rosemary S McDonald and a number of individuals involved in a bitter child custody battle that is pending in Mississippi state court, conspired to take away his children by unlawful violations of his constitutional rights. Our review of the record discloses none of the defendants are amenable to suit under 1983.

(1) McDonalds claims against Special Chancellor Griffin in his official capacity are barred by the Eleventh Amendment because Griffin was acting as a state official. (2) To the extent McDonald alleges claims against Griffin in his individual capacity, it is clear that Griffin is entitled to absolute judicial immunity from suit. (3) McDonald has not shown that Griffins actions were taken outside of his judicial capacity or in the complete absence of all jurisdiction. (4) Contrary to McDonalds argument, the district court did not abuse its discretion by granting Griffins motion for a stay of discovery pending resolution of his immunity defense. (5) The remaining defendants are not state actors and are not subject to suit under 1983. (6) McDonald's conclusional allegations that the private defendants conspired with Special Chancellor Griffin to deprive him of his constitutional rights, absent reference to material facts, are insufficient to establish the existence of a conspiracy. (7) The district court did not err in dismissing McDonalds complaint for failure to state a claim upon

which relief may be granted. Nor did the district court err or abuse its discretion in denying McDonalds Rule 59 (e) motion to alter or amend the judgment dismissing McDonalds complaint.

The judgment appealed is AFFIRMED.

(1) The district court alternatively dismissed McDonalds claims under the Rooker-Feldman doctrine which provides that "federal district courts, as courts of original jurisdiction, lack appellate jurisdiction to review, modify, or nullify final orders of state court." See Weekly v Morrow 204 F 3d 613, 615 (5th Cir 2000) (citation omitted). As the Mississippi child custody proceeding in question in this case is currently pending, there is no final judgment to which the Rooker-Feldman doctrine may apply. Despite this error, the district courts dismissal of McDonalds complaint may be affirmed on the alternative basis that none of the parties are subject to suit under 1983.
(2) Bass v Parkwood Hosp 180 F 3d 234 (5th Cir 1999)
(3) Krueger v Reimer 66 F 3d 75 (5th Cir 1995)
(4) Malina v Gonzales 994 F 2d 1121 (5th Cir 1993)
(5) Hulsey v Owens 63 F 3d 354 (5th Cir 1995)(holding absolute immunity is immunity from suit rather than simply a defense against liability)
(6) Piotrowski v City of Houston 51 F 3d 512 (5th Cir 1995); 42 USC 1983.
(7) Mills v Criminal Dist Court No 3 837 F 2d 677 (5th Cir 1988)

APPENDIX 53

U.S. Court of Appeals
Filed
Jul 25 2000
Charles R. Fulbruge III
Clerk

APPENDIX 54

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO 99-60783

HOWARD C MCDONALD JR
PLAINTIFF- APPELLANT

V

WILLIAMS L GRIFFIN JR; JOHN DOE INSURANCE; AMERICAN CIVIL LIBERTIES UNION INC; JOHN DOE INSURANCE; LESLIE J COOPER; DUNABR WILLIAMS PLLC; JOHN DOE INSURANCE; C JACKSON WILLIAMS; ROSEMARY S MCDONALD; NANCY R EVANS
DEFENDANTS- APPELLEES

Appeal from the United States District Court for the Northern District of Mississippi, Aberdeen

ON PETITION FOR REHEARING

Before POLITZ, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

APPENDIX 55

-S-
Henry A Politz
United States Circuit Judge
REHG-2

U.S. COURT OF APPEALS
FILED
AUG 22 2000
CHARLES R. FULBRUGE III
CLERK